University of Michigan Law School Grading System

Honor Points or Definitions

Through Winter Term 1993		Beginning Summer Term 1993	
A+	4.5	A+	4.3
A	4.0	A	4.0
B+	3.5	A-	3.7
B	3.0	B+	3.3
C+	2.5	B	3.0
C	2.0	B-	2.7
D+	1.5	C+	2.3
D	1.0	C	2.0
E	0	C-	1.7
		D+	1.3
		D	1.0
		E	0

Other Grades:

F Fail.

H Top 15% of students in the Legal Practice courses for students who matriculated from Spring/Summer 1996 through Fall 2003. Top 20% of students in the Legal Practice courses for students who matriculated in Spring/Summer 2004 and thereafter. For students who matriculated from Spring/Summer 2005 through Fall 2015, "H" is not an option for LAW 592 Legal Practice Skills.

I Incomplete.

P Pass when student has elected the limited grade option.*

PS Pass.

S Pass when course is required to be graded on a limited grade basis or, beginning Summer 1993, when a student chooses to take a non-law course on a limited grade basis.* For SJD students who matriculated in Fall 2016 and thereafter, "S" represents satisfactory progress in the SJD program. (Grades not assigned for LAW 970 SJD Research prior to Fall 2016.)

T Mandatory pass when student is transferring to U of M Law School.

W Withdrew from course.

Y Final grade has not been assigned.

* A student who earns a grade equivalent to C or better is given a P or S, except that in clinical courses beginning in the Fall Term 1993 a student must earn a grade equivalent to a C+ or better to be given the S.

MACL Program: HP (High Pass), PS (Pass), LP (Low Pass), F (Fail)

Non-Law Courses: Grades for these courses are not factored into the grade point average of law students. Most programs have customary grades such as A, A-, B+, etc. The School of Business Administration, however, uses the following guides: EX (Excellent), GD (Good), PS (Pass), LP (Low Pass) and F (Fail).

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The work reported on the reverse side of this transcript reflects work undertaken for credit as a University of Michigan law student. If the student attended other schools or colleges at the University of Michigan, a separate transcript may be requested from the University of Michigan, Office of the Registrar, Ann Arbor, Michigan 48109-1382.

Any questions concerning this transcript should be addressed to:

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625 South State Street
Ann Arbor, Michigan 48109-1215
(734) 763-6499

UNIVERSITY OF MICHIGAN LAW
Legal Practice Program
625 South State Street
Ann Arbor, Michigan 48109-1215

Tim Pinto
Clinical Professor of Law

June 21, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

The purpose of this letter is to offer a recommendation for Claire Haws, who I understand is applying to be a clerk in your chambers. I believe Claire will be an excellent clerk, and I strongly recommend her.

Claire was a student in my Legal Practice class at the University of Michigan Law School during the 2019-2020 school year. Legal Practice is a full year course, required for first year students, covering legal writing, research, and various elements of legal practice such as ethics, negotiation, and oral argument. During the year, I not only saw Claire in class, but also met with her individually a number of times. She also was a student in my Sports Law class in the winter 2020 semester. As a result, I got to know her, and her work, quite well.

Claire did excellent work in both classes. In Legal Practice, she was one of the strongest writers and researchers in the class. On every written assignment, she received one of the top grades. She writes crisply, analyzes well, and describes cases clearly. Her research was always well organized and on point. While the class was graded entirely as “pass/fail” due to the pandemic, I can confidently state that Claire’s work was at the top of her class.

More to the point, Claire approached the class with the exact sort of diligence and professionalism that I believe will make her a valuable clerk. She was on time with every assignment (and often early!), and asked astute questions in class and in our conferences. For writing assignments, it is my practice to send written feedback to the students, and then meet with them to discuss that feedback before they prepare a new draft. Claire routinely would show up to these conferences with prepared questions and a clear agenda. She used our time together to figure out ways she could get better. She welcomed feedback and did a wonderful job of incorporating those comments into his next drafts.

Her work in my Sports Law class was also terrific. She adeptly absorbed the basic content of the class, and consistently demonstrated an ability to jump ahead to the more interesting and nuanced issues. In fact, she and I had some side conversations about the antitrust defenses being offered by the NCAA in amateurism cases, and it led to her doing a lot more reading and research about the issue. She eventually decided to write a student note on the issue for her journal, and I have been working with her over the last semester to offer edits and to discuss the content of the note. She has consistently impressed me with her clear thinking, clear writing, and intellectual curiosity.

Simply put, Claire is going to be an excellent judicial clerk. She is smart, professional, and diligent. She is going to fit in well in any chambers, and do great work. I am happy to recommend her, and I hope you consider her application seriously. I would welcome the opportunity to speak with you directly if you would like any further information.

Sincerely,

/Timothy M. Pinto/

Timothy M. Pinto
Clinical Professor of Law

Timothy Pinto - tpinto@umich.edu - 734-763-6256

June 20, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Re: Letter of Recommendation for Claire Haws

Dear Judge Hanes:

I am pleased to recommend Claire Haws, a rising 3L at the University of Michigan Law School for a clerkship in your chambers.

Claire is a skilled, careful, and efficient legal researcher and writer. Claire was a student of mine in the Civil-Criminal Litigation Clinic in the Fall 2020. While she worked with my colleagues teaching the clinic on trial level cases, during that semester, she and her clinic partner wrote three separate briefs for me. Each one was done excellently, thoroughly, and on time.

The first pleading that Claire worked on was filed in the state felony court for a direct appeal of a misdemeanor conviction after a bench trial. Claire researched, wrote and edited the second issue in the brief, regarding the lower court's factfinding. She demonstrated that she was adept at legal research, able to apply and distinguish prior cases, and to harmonize facts and law.

She and her clinic partner also completed a spot-on reply brief for this pleading under significant time pressure. Opposing counsel raised a new issue in the responsive pleading and Claire and her partner were not thrown off, as some students might have been. Instead, she figured out how to best address and argue against this new issue as well.

The third pleading she co-wrote was a supplement to a leave application to our state supreme court on a juvenile life without parole case. The original leave application had been filed over a year earlier and had been held in abeyance pending another matter that was now resolved. For her portion of this brief, Claire showed her facility with federal and state constitutional law and her ability to write clearly about complex areas of law. She also successfully collected and deployed data on the imposition of life without parole on juveniles in other states to provide accurate factual information to our court.

It is unusual for a student-attorney in our clinic to work on this many pleadings in one semester. I came to rely on Claire and her clinic partner as my "go-to" team when I needed prompt, reliable legal research and writing. For all three briefs, Claire made sure that her pleadings were both accurate and also the best representation possible for her clients. She was also attentive to deadlines, court procedure, and the other less glamorous, but equally important, aspects of completing these pleadings.

Even during our "virtual" year, Claire has been engaged in the Michigan Law community through her as an editor on the Michigan Business and Entrepreneurial Law Review, working on a student note, and volunteering as an advocate for students who have experienced sexual assault or harassment.

Claire hopes to join a research and writing-focused litigation practice after law school, which will be a great fit for her given her skill and obvious enjoyment of this aspect of legal practice. As a step toward that practice, she would be thrilled to work as a clerk in your chambers - I hope you will give her that chance. Please feel free to contact me at my cell phone, 734-355-2599, to discuss her application.

Sincerely,

Kimberly Thomas
Clinical Professor

Kim Thomas - kithomas@umich.edu - 734-647-4054

Claire Haws

615 South Main Street, Unit 340, Ann Arbor,
Michigan 48104651-323-3538 • chaws@umich.edu

WRITING SAMPLE

This writing sample is an excerpt of the Note I drafted for the Michigan Business and Entrepreneurial Law Review. In the Note, I analyze how recent developments in college-athlete compensation rules may impact the NCAA's future antitrust vulnerability. I have provided Parts II and III of my analysis, in which I identify weaknesses in the NCAA's traditional antitrust defense and propose a more effective strategy. Part I, which is omitted, addresses the historical development of antitrust law in the context of the NCAA. This sample reflects the initial stylistic edits I received from my research advisor. Publication of the full version of this Note is forthcoming.

Claire Haws Writing Sample

THE DEATH OF AMATERUISM IN THE NCAA: HOW THE NCAA CAN SURVIVE THE NEW ECONOMIC REALITY OF COLLEGE SPORTS

Claire Haws[*]

INTRODUCTION

In October 2019, the National Collegiate Athletic Association (NCAA) announced it would be making a major change in its rules: student-athletes will soon be permitted to receive compensation for the use of their name, image and likeness (NIL).[1] The announcement came in response to an increasing volume of state legislation allowing for student-athlete NIL compensation.[2] This change represents a nail in the coffin for the dying ideal of amateurism.

For years, the NCAA has defended its rules from antitrust challenges with the procompetitive justification of preserving amateurism.[3] As permissible compensation for student-athletes has expanded, the NCAA has continuously adjusted its definition of amateurism to fit its needs.[4] Now, it has become clear that no coherent concept of amateurism exists in college sports. Yet, the death of amateurism does not have to lead to the death of the NCAA. This Note concludes that in future antitrust challenges, the NCAA will need to point to a

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[*] J.D. Candidate, May 2022, University of Michigan Law School. Thank you Professor Timothy Pinto and the staff of the *Michigan Business & Entrepreneurial Law Review* for your support and guidance.

[1] *Board of Governors Starts Process to Enhance Name, Image and Likeness Opportunities,* NCAA (Oct. 29, 2019, 1:08 PM), https://www.ncaa.org/about/resources/media-center/news/board-governors-starts-process-enhance-name-image-and-likeness-opportunities [hereinafter *Board of Governors*].

[2] Ben Pickman, *NCAA Votes to Start Process Permitting Athletes to Benefit from Likeness*, SPORTS ILLUSTRATED (Oct. 29, 2019), https://www.si.com/college/2019/10/29/ncaa-student-athlete-likeness-permitted-vote.

[3] John Niemeyer, *The End of an Era: The Mounting Challenges to the NCAA's Model of Amateurism*, 42 PEPP. L. REV. 883 (2015).

[4] *O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 1000 (N.D. Cal. 2014).

procompetitive justification other than amateurism to defend its rules. An antitrust defense based on the unique culture of college sports, rather than amateurism, will align with the realities of student-athlete compensation without sacrificing the NCAA's ability to enforce eligibility rules.

Part I of this note provides background for the relevant antitrust law and its historical application to the NCAA. Part II discusses how the concept of amateurism in collegiate athletics is unraveling and argues that amateurism will no longer be an effective defense in antitrust challenges to NCAA rules. Part III proposes a solution to the problems addressed in Part II that will allow the NCAA to maintain its distinct product of collegiate athletics without depending on the dying concept of amateurism.

PART I: BACKGROUND

[OMITTED]

PART II: THE CURRENT STATE OF AMATEURISM

A. AMATEURISM NO LONGER EXISTS IN THE NCAA

Today, however, the concept of amateurism in intercollegiate athletics is unraveling. The "quantum leap" contemplated in *O'Bannon* has already happened.[5] Student-athletes are already receiving cash benefits unrelated to education.[6] States have begun enacting legislation permitting college-athletes to enter into endorsement deals and receive compensation for the use of their NILs.[7] In October 2019, the NCAA announced it will modify its rules to permit this sort of

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[5] *In re NCAA Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp 3.d 1058, 1071 (N.D. Cal. 2019), *aff'd*, 958 F.3d 1239 (9th Cir. 2020), *cert. granted sub nom. NCAA v. Alston*, 141 S. Ct. 1231 (2020).
[6] *Id.* at 1073.
[7] Ross Dellenger, *With Recruiting in Mind, States Jockey to One-Up Each Other in Chaotic Race for NIL Laws*, SPORTS ILLUSTRATED (Mar. 24, 2021), https://www.si.com/college/2021/03/04/name-image-likeness-state-laws-congress-ncaa [hereinafter Dellenger, *Recruiting in Mind*].

compensation, albeit with "guardrails."[8] It has become clear that "amateurism" in college sports, at least defined in economic terms, is dying. The NCAA's traditional antitrust armor no longer seems like a viable option in future antitrust challenges to its rules.

Criticism of the NCAA's inability to abide by a consistent definition of amateurism has become even more justified in the years since *O'Bannon*. The NCAA already permits compensation above the cost of attendance, such as monetary awards for participation or achievement in athletics.[9] The NCAA's Student Assistance Fund and Academic Enhancement Fund allow schools to give money to student-athletes above the cost of attendance.[10] In 2018, the NCAA made a combined total of over $130 million available for distribution of these funds.[11] Schools disburse they money "to assist student-athletes in meeting financial needs, improve their welfare or academic support, or recognize academic achievement."[12] There are no limits on the amount of these funds schools can give to an individual student athlete, they can be in the form of cash or benefits, and need not be for purposes related to education.[13]

In addition to payments above cost of attendance from schools to student-athletes, the NCAA has expanded permissible payments to student-athletes from third parties.[14] Since 2015, "international" student-athletes can accept *unlimited* funds from their country's Olympic

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[8] Michael McCann, *Legal Challenges Await After NCAA Shifts on Athletes' Name, Image and Likeness Rights*, SPORTS ILLUSTRATED (Apr. 29, 2020), https://www.si.com/college/2020/04/29/ncaa-name-image-likeness-changes-legal-analysis.
[9] NCAA, Division I Manual 16.1.4.1 (2020). *See also In re NCAA Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058, 1071-72 (N.D. Cal. 2019).
[10] NCAA, *supra* note 9, at 16.11.1.8, 15.01.6.1; *In re NCAA Antitrust Litig.*, 375 F. Supp. 3d at 1072.
[11] *In re NCAA Antitrust Litig.,* 375 F. Supp. 3d at 1072.
[12] *Id.*
[13] *Id.* at 1073.
[14] *Id.* at 1074.

governing body based on their performance in certain elite international competitions.[15] Likewise, student-athletes competing for the U.S. Olympic team are permitted to accept unlimited funds from the U.S. Olympic Committee based on their performance.[16]

These NCAA rules reflect no coherent concept of amateurism. The NCAA's current definition of amateurism states:

> Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.[17]

This definition completely ignores the reality of intercollegiate sports today. College sports are a multibillion dollar industry.[18] NCAA member institutions, coaches, and corporate sponsors enjoy enormous profits as a result of their involvement, and success, in college sports.[19] Recent scandals involving student-athletes demonstrate that many NCAA member institutions value the "athlete" portion of that identity more than the "student" aspect.[20] While the NCAA and its member institutions may still care about their student-athletes' education, they sacrifice that for their school-team success.[21]

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[15] NCAA, *supra* note 9, at 12.1.2.1.5.2
[16] *Id.* at 12.1.2.1.5.1.
[17] *Id.* at 2.9.
[18] Marc Edelman, *The NCAA, Fair Pay to Play, Antitrust Scrutiny, and the Need for Institutional Reform*, 20 WAKE FOREST J. BUS. & INTELL. PROP. L. 177, 178 (2020).
[19] *Id.* at 178-79 (noting that the benefits to NCAA member institutions go beyond the revenue generated by their athletic programs: successful athletic programs often lead to increased new-student applications to the school and increased alumni donations).
[20] *See id.* at 182-83.
[21] *See id.*

The NCAA claims their amateurism model allows student-athletes to focus on their education by limiting compensation and restricting athletic training to twenty hours per week.[22] The actual experiences of student-athletes reflect a different reality. As one Ohio State football player put it, "we ain't come to play school."[23] In a 2015 NCAA study, Division 1 football players reported they spent a median of 42 hours per week on athletics.[24] Both athletes and coaches admit that "voluntary" practices are not truly voluntary.[25] Athletes are forced to pick certain classes—and sometimes majors—to accommodate their team schedule.[26] Team travel makes missed classes unavoidable.[27] Yet, the NCAA hypocritically suggests that all student-athletes are "motivated primarily by education and by the physical, mental and social benefits to be derived" from their participation in intercollegiate athletics.[28]

B. Responses to the Death of Amateurism

Against the backdrop of this market reality, court opinions are becoming less deferential to the NCAA. *O'Bannon* was a first step, but a Ninth Circuit ruling in *NCAA V. Alston* represents an even starker change. In *Alston*, plaintiffs brought an antitrust challenge to NCAA

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[22] NCAA, *supra* note 9, at 17.1.7.1.
[23] @Cordale10, Twitter, (Oct. 5, 2012, 8:43 AM) (this tweet has since been deleted, but a screenshot is available at https://i.imgur.com/dFY0U.png).
[24] NCAA, NCAA GOALS Study of the Student-Athlete Experience: Initial Summary of Findings 2 (2016).
[25] Hannah Smothers, *NCAA Athletes Were Pressured to Practice. Now Over 150 Have COVID-19*, Vice (June 26, 2020), https://www.vice.com/en/article/g5p5jm/college-athletes-test-positive-for-coronavirus-after-voluntary-workouts-ncaa.
[26] Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as an Employee*, 81 Wash. L. Rev. 71, 100 (2006).
[27] Andrew Carter, *As College Athletes Travel More, Missed Classes Come into Focus*, News Observer (Dec. 29, 2017), https://www.newsobserver.com/sports/college/acc/duke/article192121459.html.
[28] NCAA, *supra* note 9, at 2.9.

compensation rules.[29] The Northern District Court of California entered judgment in plaintiffs' favor, and the Ninth Circuit affirmed.[30] In its ruling, the Court accepted plaintiffs' argument that the "quantum leap" considered in *O'Bannon*—permitting compensation beyond cost of attendance—has already occurred.[31] The decision marks a major shift from courts' traditional treatment of amateurism as an antitrust defense.

Even internally, the NCAA has begun to recognize that "there is a general sense that intercollegiate athletics is as thoroughly commercialized as professional sports."[32] Unlike professional sports, however, the lucrative industry of college sports is founded on the unpaid labor of student-athletes. Rather than protecting student-athletes from exploitation at the hands of corporations, the NCAA and its member institutions are exploiting their own students for reputational and financial gain.[33]

Public opinion on the issue of student-athlete compensation has shifted. The NCAA has consistently argued that the preservation of amateurism benefits consumers.[34] Yet, studies indicate that the majority of consumers *favor* rules permitting increased compensation for student-athletes.[35] An expert witness for the plaintiffs in *NCAA v. Alston* conducted research indicating that rule changes allowing above-COA payments had "no negative impact on

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[29] *In re NCAA Antitrust Litig.*, 958 F.3d 1239, 1247 (9th Cir. 2020), *cert. granted sub nom. NCAA v. Alston*, 141 S. Ct. 1231 (2020).
[30] *Id.* at 1263.
[31] *Id.* at 1255.
[32] Memorandum of Points and Authorities in Support of Motion by Antitrust Plaintiffs for Summary Judgment, In re NCAA Antitrust Litig., 375 F. Supp 3.d 1058 (N.D. Cal. 2019) (No. 4:09-cv 1967 CW).
[33] *See* Marc Edelman, *The NCAA, Fair Pay to Play, Antitrust Scrutiny, and the Need for Institutional Reform*, 20 WAKE FOREST J. BUS. & INTELL. PROP. L. 177 (2020).
[34] *In re NCAA Antitrust Litig.*, 958 F.3d 1239, 1249 (9th Cir. 2020).
[35] *Id.*

consumer demand."[36] Another expert survey found that "consumers would continue to view or attend college athletics (at the same rate) even if eight types of compensation that the NCAA currently prohibits or limits were individually implemented."[37] Given this backdrop, the NCAA's go-to argument—that consumers will lose interest in college sports if the athletes receive any payment—doesn't seem to hold water.

Recent state legislation reflects these changing views on amateurism. In September 2019, California became the first state to enact legislation allowing for student-athletes to enter into endorsement deals and profit off the use of their own NIL.[38] As of March 2021, six states have passed similar legislation, while over thirty others have introduced bills of their own.[39] Although they are similar, these various state laws are not identical, and could pose problems for the NCAA and its member institutions.[40] According to Big 12 commissioner Bob Bowlsby, current state legislation forces schools into a "catch-22" of violating NCAA rules while complying with state laws.[41]

In response to state NIL legislation and public pressure, the NCAA announced a massive shift in its position on the issue. In October 2019, the NCAA's Board of Governors voted to permit student-athletes "to benefit from the use of their name, image and likeness in a manner consistent with the collegiate model."[42] NCAA proposals include "guardrails" limiting

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[36] *Id.* at 1250.
[37] *Id.*
[38] Michael McCann, *What's Next After California Signs Game Changer Fair Pay to Play Act into Law?*, SPORTS ILLUSTRATED (Sep. 30, 2019), https://www.si.com/college/2019/09/30/fair-pay-to-play-act-law-ncaa-california-pac-12.
[39] Dellenger, *Recruiting in Mind*, *supra* note 7.
[40] *Id.*
[41] *Id.*
[42] *Board of Governors*, *supra* note 1.

permissible NIL compensation; the NCAA believes that without these, NIL compensation could be considered pay for play or unduly influence recruiting.[43] NCAA NIL legislation was expected in January 2021, but has since been delayed due to the pending Supreme Court decision in *Alston*.[44]

Facing a plethora of incongruent state NIL laws, the NCAA has turned to Congress for help.[45] A federal bill could preempt state laws, and help the NCAA avoid litigation.[46] Unfortunately for the NCAA, however, federal NIL legislation is unlikely to come quickly. A few federal bills have been introduced, but Democrats and Republicans are somewhat split on the proper scope of NIL laws.[47] And whatever the content of eventual federal NIL legislation, it is unlikely the law meets all of the NCAA's requests.[48] Given the political composition of Congress, the consensus is that a federal law will be less restrictive of permissible NIL compensation and will provide the NCAA with little to no antitrust protection for its amateurism rules.[49] As a result, any additional restrictions the NCAA places on NIL compensation will be subject to antitrust scrutiny.

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[43] *Id.*
[44] Ross Dellenger, *Latest Congressional NIL Bill Would Allow Athletes to Enter Draft and Return to College*, SPORTS ILLUSTRATED (Feb. 24, 2021), https://www.si.com/college/2021/02/24/ncaa-athlete-rights-compensation-congress-jerry-moran [hereinafter Dellenger, *Congressional NIL Bill*].
[45] Ross Dellenger, *As Congressional Power Shifts, NCAA Reform and Athletes' Rights Are Firmly in the Crosshairs*, SPORTS ILLUSTRATED (Jan. 20, 2021), https://www.si.com/college/2021/01/20/ncaa-athlete-rights-compensation-congress-nil [hereinafter Dellenger, *Congressional Power Shifts*].
[46] Dellenger, *Congressional NIL Bill*, *supra* note 44.
[47] *Id.*
[48] Dellenger, *Congressional Power Shifts*, *supra* note 45.
[49] *Id.*

Now, in light of the shift in legal deference and the many legislative attacks on NIL compensation limits, amateurism as an antitrust defense appears to be on its last legs. Without amateurism as an effective pro-competitive justification for those restraints, the NCAA could find itself newly vulnerable to antitrust attacks. The NCAA will have to identify a new procompetitive justification for its eligibility rules if it is to have eligibility rules at all.

PART III: HOW THE NCAA CAN RESPOND

A. A NEW PROCOMPETITIVE JUSTIFICATION FOR NCAA RULES

Fortunately for the NCAA, the death of amateurism will not necessarily lead to an onslaught of antitrust liability. The NCAA needs to impose certain rules in order to maintain their distinct product. Rather than relying on the vanishing procompetitive justification of preserving amateurism to defend these rules, the NCAA should shift to a procompetitive justification of "preserving the unique culture of intercollegiate athletics." This justification aligns with economic reality and consumer opinion. Such a justification would be much stronger than pretending "amateurism" actually means anything. To defend its rules from antitrust challenges, the NCAA needs to stop talking about money, and start focusing on the culture of college sports.

Ironically, the current status of the NCAA's antitrust liability mirrors that at the time of the *Board of Regents* decision: the case that originally established amateurism as a valid procompetitive justification.[50] There, the Court recognized that "consistent with the Sherman Act, the role of the NCAA must be to preserve a tradition that might otherwise die."[51] Because the challenged output restrictions in *Board of Regents* were "hardly consistent with this role,"

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[50] *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 119 (1984).
[51] *Id.* at 120.

they were invalidated.[52] Today, the NCAA's role remains the same. The tradition they are preserving, however, is not amateurism, but the unique culture of college sports. Compensation rules are no longer consistent with that role, but remaining NCAA rules should survive antitrust scrutiny.

Preserving the culture of a product may be a novel antitrust justification. Yet, existing antitrust caselaw supports the validity of this justification. In antitrust cases, courts have consistently recognized that horizontal agreements are procompetitive when they are "necessary to market the product at all."[53] Similarly, horizontal agreements may "make possible a new product by reaping otherwise unattainable efficiencies" and thus may be procompetitive.[54] The language in the *Board of Regents* decision, recognizing "the maintenance of a revered tradition of amateurism in college sports" as a legitimate justification, resembles the ideal of preserving a culture.[55] A procompetitive justification of "preserving the unique culture of college sports" is a logical development of antitrust jurisprudence.

B. THE CONSEQUENCES IF THE NCAA FAILS TO ADOPT A NEW APPROACH

In the absence of an alternative justification, the death of amateurism could lead to the death of the NCAA. Rules unrelated to compensation will still be subject to antitrust scrutiny. If the NCAA cannot offer a procompetitive justification for these rules, they will not survive Rule of Reason analysis. Existing agreements amongst member institutions and the NCAA on rules

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[52] *Id.*
[53] *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 23 (1979).
[54] *Bd. of Regents*, 468 U.S. at 113 (quoting Arizona v. Maricopa County Medical Society, 457 U.S. 332, 365 (1982) (Powell, J., dissenting)).
[55] *Id.* at 120 (the Court implied it considered the culture of college sports throughout the opinion, noting "academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable," and that certain NCAA rules are necessary to "preserve the character" of its product).

regarding recruiting, academic eligibility, playing and practice seasons, and postseason competitions all constitute horizontal restraints.[56] Without a procompetitive defense, these rules could fail antitrust scrutiny, leaving the NCAA powerless to enforce uniform rules across member institutions. As a result, the institution of the NCAA would serve no purpose.

Of course, many NCAA rules unrelated to compensation mirror rules used by professional sports teams. In order for any sports league to function, certain horizontal restraints are necessary.[57] Thus, courts have consistently applied the Rule of Reason to antitrust challenges in the professional sport context as well.[58] NCAA rules requiring "cooperat[ion] in the production and scheduling of games," for example, would likely survive antitrust scrutiny on the same basis as analogous professional league rules.[59] Yet, the NCAA requires a procompetitive defense beyond those used in the context of professional sports. Without a new justification for NCAA rules that are unique to college sports, the NCAA's product could become indistinguishable from minor professional leagues. If the NCAA fails to identify a new procompetitive justification for its rules, it may no longer be able to provide a distinct product.

C. The True Defining Characteristics of College Sports

The thing that makes the NCAA's product distinct—and drives consumer demand—is the unique culture of college sports. The NCAA Constitution identifies its basic purpose as retaining "a clear line of demarcation between intercollegiate athletics and professional sports."[60]

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[56] *See, e.g.*, NCAA, *supra* note 9, at 13.01-14.9, 17.01-18.7.
[57] *Bd. of Regents*, 468 U.S at 101.
[58] Gabriel Feldman, *Antitrust Versus Labor Law in Professional Sports: Balancing the Scales After Brady v. NFL and Anthony v. NBA*, 45 UC Davis L. Rev. 1221, 1222 (2012).
[59] *Am. Needle, Inc. v. NFL*, 560 U.S. 183, 202 (2010).
[60] NCAA, *supra* note 9, at 1.3.1.

The NCAA can still retain this demarcation, and defend its rules from antitrust scrutiny, if it identifies the features that *actually* make college sports distinguishable from other sports leagues.

College sports are unique because student-athletes play for the school that they attend. Fan support is motivated more by loyalty to a team as a whole than by support for individual players.[61] Consumer demand is driven by attachments to one's alma mater or schools in a particular geographic area.[62] All of these factors contribute to college sports constituting a distinct product from professional sports. NCAA rules meant to protect the unique culture of college sports should survive antitrust scrutiny.

Although it can't be used to justify all of its compensation rules, the NCAA shouldn't abandon its past position that "student" status drives demand.[63] Rather, student status is one of the factors that makes intercollegiate athletics distinct from professional sports. In *Alston*, neither the District Court nor the Ninth Circuit accepted the NCAA's argument that "student" status was connected to the challenged compensation rules, noting that "student-athletes would continue to be students in the absence of the challenged rules."[64] The Ninth Circuit's opinion suggests, however, that rules that *are* connected to student status may be defensible.

Using a procompetitive justification based on the unique culture of college sports, NCAA eligibility rules regarding academics would be reasonable. NCAA bylaws require that student-athletes be enrolled in a "full-time program of studies, be in good academic standing, and

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[61] David Gargone, *A Study of the Fan Motives for Varying Levels of Team Identity and Team Loyalty of College Football Fans*, SPORT J. (Jan. 25, 2016), https://thesportjournal.org/article/a-study-of-the-fan-motives-for-varying-levels-of-team-identity-and-team-loyalty-of-college-football-fans/.
[62] *O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 977-78 (N.D. Cal. 2014).
[63] *In re NCAA Antitrust Litig.*, 958 F.3d 1239, 1250 (9th Cir. 2020).
[64] *Id.*

maintain progress" toward a degree.[65] This particular rule could be justified as necessary to maintain student-athletes' status as students, thus protecting the unique culture of college sports. Rules limiting the number of seasons in which a student-athlete may compete, eligibility to play after transfer, and permissible recruitment activities could be defended on a similar basis.

CONCLUSION

Amateurism no longer exists in college sports. Student-athletes are already receiving compensation beyond the cost of attendance, and will soon be permitted to enter into endorsement deals and profit off the use of their name, image and likeness. But the death of amateurism doesn't have to mean the death of the NCAA. If the NCAA successfully adopts a new antitrust defense based on the unique culture of college sports, the NCAA's distinct product—and the NCAA itself—can survive.

[65] NCAA, *supra* note 9, at 14.01.2.

Applicant Details

First Name	**Ever**
Last Name	**Hess**
Citizenship Status	**U. S. Citizen**
Email Address	**emhess08@gmail.com**
Address	**Address** **Street** **45 Park Lane S Apt 402** **City** **Jersey City** **State/Territory** **New Jersey** **Zip** **07310** **Country** **United States**
Contact Phone Number	**540-521-0772**

Applicant Education

BA/BS From	**University of Virginia**
Date of BA/BS	**May 2015**
JD/LLB From	**George Mason University School of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=54701&yr=2011**
Date of JD/LLB	**May 19, 2018**
Class Rank	**25%**
Law Review/ Journal	**Yes**
Journal(s)	**George Mason Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**George Mason University School of Law Moot Court Board**

Bar Admission

Admission(s)	**New Jersey, New York**

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**Yes**

Specialized Work Experience

Recommenders

Graeff, Kathryn
kathryn.graeff@mdcourts.gov
Erbeck, Marita
marita.erbeck@faegredrinker.com
FitzGerald, Suzanne
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References

The Honorable Kathryn Grill Graeff
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This applicant has certified that all data entered in this profile and any application documents are true and correct.

Ever Hess

45 Park Lane S Apt 402 · Jersey City, NJ 07310
540-521-0772 · emhess08@gmail.com

August 25, 2020

The Honorable Elizabeth W. Hanes
United States District Court for the Eastern District of Virginia
Spottswood W. Robinson III and Robert R. Merhige, Jr., Federal Courthouse
701 East Broad Street
Richmond, VA 23219

Dear Judge Hanes:

I am writing to apply for a clerkship in your chambers for the 2021-2023 term. I am a graduate of George Mason University School of Law and am currently an associate at Faegre Drinker Biddle & Reath, doing primarily general commercial business litigation.

Throughout my time in law school and beyond, I have strived to hone my legal reading, writing, and research skills to push myself towards a career as a quality litigator. My experience in Faegre Drinker's business litigation practice group and clerking for the Honorable Kathryn Grill Graeff have further developed my passion for litigation that I discovered in law school. Working at the firm has offered me the opportunity to participate in multiple phases of litigation with a variety of talented lawyers. This not only has allowed me to further sharpen my research and writing skills by requiring me to comprehensively consider the needs of different clients and find the best solutions to meet those needs, but also has broadened my appreciation for the number of unique perspectives that can be brought to bear on any particular legal issue.

Indeed, my work at the firm has expanded my fundamental understanding of the skills and tools I began gathering and refining in law school and at my clerkship for Judge Graeff. While in law school, I worked as a Writing Fellow for George Mason's first-year legal writing program. In that capacity, I developed 1L legal writing problems, graded student briefs and memos, and led weekly legal writing tutorials. My time as a Writing Fellow, as well as my time as the Senior Articles Editor of *George Mason Law Review*, equipped me to process and distill large amounts of information, which was an essential skill required in Judge Graeff's chambers, as she maintained a large caseload and reviewed complex appeals on a daily basis. Having clerked for Judge Graeff, I was given the privilege to gain substantive experience in dealing with complex issues at the appellate stage. I am confident that my prior experience clerking for Judge Graeff will allow me to bring a unique perspective to a chambers considering various legal issues in the first instance. Moreover, I believe my prior experience will also allow me to meaningfully add value to your chambers, as I come equipped with the many invaluable lessons I learned during my time with Judge Graeff.

I welcome the opportunity to serve as a clerk in your chambers. I have enclosed my resume, law school transcript, and a writing sample for your review. Additionally, I have enclosed letters of recommendation from Judge Graeff, Marita Erbeck, and Professor FitzGerald, as well as a list of references.

Ever Hess

45 Park Lane S Apt 402 · Jersey City, NJ 07310
540-521-0772 · emhess08@gmail.com

Please do not hesitate to contact me if I can provide you with any additional information. Thank you very much for your time and consideration, and I look forward to hearing from you.

Sincerely,

Ever Hess

Ever Hess

45 Park Lane S Apt 402 · Jersey City, NJ 07310
540-521-0772 · emhess08@gmail.com

BAR ADMISSIONS

New Jersey

New York

EDUCATION

Antonin Scalia Law School, George Mason University, Arlington, VA
Juris Doctor, May 2018, *cum laude*
Class Rank: Top 22% (31/138) • GPA: 3.65/4.33
Honors: Mason Law Scholarship recipient
2016 First Year Moot Court Competition Advancing Round Competitor
2016 Upper Class Moot Court Competition Quarter-Finalist
2017 New York Bar National Moot Court Competition Region 4 Semi-Finalist
Activities: *George Mason Law Review*, Senior Articles Editor
Moot Court Board, Member
Writing Fellow (selected to teach in Legal Research, Writing, and Analysis program)

University of Virginia, Charlottesville, VA
Bachelor of Arts, Government (Political Science), May 2015, *with distinction*
GPA: 3.692/4.0
Activities: Phi Alpha Delta Pre-Law Fraternity, International, Co-founder and Vice President
Madison House volunteer organization, "Adopt a Grandparent" program

EXPERIENCE

Faegre Drinker Biddle & Reath, Florham Park, NJ
Litigation Associate, September 2019-Present
Assist clients with various aspects of legal proceedings and trial preparation, including legal research and the drafting of motions and other legal memoranda.

The Honorable Kathryn Grill Graeff, Court of Special Appeals of Maryland, Annapolis, MD
Judicial Clerk, August 2018-August 2019
Conducted legal research, drafted opinions, and drafted memoranda on a variety of issues that were appealed to the intermediate appellate court. Assisted the judge in courtroom proceedings.

Drinker Biddle & Reath, Florham Park, NJ
Summer Associate, May 2017-July 2017
Conducted legal research, drafted memoranda for attorneys, and aided attorneys in drafting motions and petitions for the firm's clients.

The Honorable Carol Ann Dalton, D.C. Superior Court, Washington, D.C.
Judicial Intern, June 2016-August 2016
Conducted legal research and drafted bench memoranda on a variety of both family law and mental health issues. Observed and assisted the judge in courtroom proceedings and pretrial conferences.

Ever Hess
George Mason University School of Law
Cumulative GPA: 3.65

Fall 2015

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Contracts I	Boardman	A	2.00	
Economic Foundations of Legal Studies	Wright	B+	3.00	
Intro to Legal Research, Writing, and Analysis	FitzGerald	A	2.00	
Property	Eagle	A	4.00	
Torts	Krauss	A	4.00	

Fall 2015 GPA Hours: 15
Cumulative GPA: 3.87

Spring 2016

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Civil Procedure	Newman	A	4.00	
Contracts II	Boardman	B+	3.00	
Criminal Law	Treyger	B+	3.00	
Legislation and Statutory Interpretation	Rao	B	2.00	
Trial-Level Writing	FitzGerald	A-	3.00	

Spring 2016 GPA Hours:15
Total GPA Hours: 30
Cumulative GPA: 3.7

Fall 2016

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Appellate Writing	Segal	A+	2.00	
Constitutional Law I- Structure of Government	Lund	A+	4.00	
Copyrights	Barblan	A	3.00	
International Law	Rabkin	A	3.00	
Scholarly Writing- Law Review	Cumby	CR	2.00	

Fall 2016 Total Hours: 14
Fall 2016 GPA Hours: 12
Cumulative GPA: 3.83

"CR" designates credit received in a course in which the possible grades are "CR" (Credit) or "No CR" (No Credit)

Spring 2017

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Administrative Law	White	A	3.00	
Jurisprudence	Krauss	B	2.00	
Law Journal Management	Barnhart Driscoll	CR	1.00	

Legal Drafting	Hemmer	B+	2.00
Strategic Leadership in Washington	Rehr	A-	2.00
Trusts & Estates	Cohen	B+	4.00
Writing Fellow Workshop	FitzGerald	CR	1.00

Spring 2017 Total Hours: 15
Spring 2017 GPA Hours: 13
Cumulative GPA: 3.75

"CR" designates credit received in a course in which the possible grades are "CR" (Credit) or "No CR" (No Credit)

Fall 2017

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Advanced Legal Reading, Writing, and Analysis	FitzGerald	A	3.00	
Appellate Advocacy	Isenstadt	A	2.00	
Business Associations	Verret	A	4.00	
Criminal Procedure-Investigation	Lerner	C+	3.00	
Professional Responsibility	Rosenblum	A	2.00	
War and Law	Malcolm	B+	2.00	

Fall 2017 GPA Hours: 16

Spring 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Advanced Legal Reading, Writing, and Analysis Seminar	FitzGerald	A	3.00	
Evidence and Trial Procedure	Davis	C	3.00	
Homeland Security and Law Seminar	McCament and Wolff	A-	2.00	
Mediation	Pope	B+	2.00	
Readings in Legal Thought	Ginsburg	B	1.00	
Remedies	Mossoff	A-	3.00	

Spring 2018 GPA Hours: 14

Grading System Description
George Mason Law as of 2016-2017

grade quality points

A+* 4.33
A+ 4.33
A 4.0
A- 3.67
B+ 3.33
B 3.00
B- 2.67
C+ 2.33
C 2.00
C- 1.67
D+ 1.33
D 1.00

D- 0.67
F 0.00

August 25, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am writing to highly recommend Ever Hess as a law clerk. She worked as my law clerk from August 15, 2018, until August 27, 2019.

Ever was an excellent member of my team. She worked very hard, was excited to tackle any issue, and had superb analytical skills to address complex legal arguments. On a personal level, Ever got along well with everyone and was a pleasure to have in chambers.

I would be happy to answer any questions that you have about Ever. Again, I highly recommend her.

Very truly yours,

Kathryn Grill Graeff
Associate Judge
Court of Special Appeals of Maryland
410-260-1466

August 25, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am pleased to provide this letter of recommendation in support of Ever Hess, who is seeking a clerkship for the 2021-2022 Court term.

By way of background, I have been with Drinker Biddle since 2001, have been a member on the summer hiring committee since 2009 and currently serve as the hiring partner for the Florham Park office. As both a practicing attorney and hiring partner, I have supervised and evaluated numerous summer associates and junior lawyers. Ever is one of the best.

Ever first joined the firm in May 2017, following her second year at George Mason University School of Law. She excelled in our program. Over the course of the summer, Ever prepared research memoranda, analyzed contracts and drafted sections of briefs for use by our attorneys. The areas of the law that Ever examined ran the gamut, but she was a quick study, eager to learn and successfully mastered the necessary subject matter. Ever's research was sound and her final product required very little editing. By the end of the summer, Ever had become one of our stars. Following her clerkship with Judge Graeff, we have been lucky to count Ever among our ranks. Even over the course of the past few months, at a time that the demands of a legal practice are uncertain and inconsistent, Ever has leaned in to those challenges and has risen above many others in her class. She seeks out work, both from those within her group and outside the group (myself included) and has remained busy often as a result of her initiative.

On a personal level, Ever is a pleasure to work with. She is efficient, bright, personable, hardworking, and shows good judgment and common sense. She is a leader among her peers and always enthusiastically rallies her team to tackle the task at hand. Ever easily stands above the crowd in terms of her intellectual ability, maturity and drive. While I look forward to her eventual return to Drinker Biddle after her service with Your Honor, I am confident that Ever will make an excellent law clerk and recommend her to you without hesitation.

I remain available to address any questions or concerns that you may have. Thank you for your consideration.

Respectfully,

Marita S. Erbeck

Marita Erbeck - marita.erbeck@faegredrinker.com

George Mason University
Antonin Scalia Law School
33301 Fairfax Drive
Arlington, VA 22201

August 25, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am pleased to write this letter on behalf of Ever Hess, whom I strongly recommend for a judicial clerkship in your chambers.

As Director of George Mason's First Year Legal Research, Writing, and Analysis Program, I teach the required first-year writing courses and coordinate the Writing Fellow Program. During the 2015-2016 academic year, I had the pleasure of having Ms. Hess in two introductory writing courses. Because the first-year writing curriculum requires students to conduct research; draft office memoranda, pleadings, discovery, and motion briefs; and engage in oral argument, I had many opportunities to assess Ms. Hess's analytical ability, communication skills, and professional interactions.

Ms. Hess performed very well in my class, earning an A in the fall and an A- in the spring. She quickly grasped the fundamentals of legal writing and analysis, and she excelled at a variety of tasks, from research and writing to citation and oral advocacy. Ms. Hess frequently received the top score in her section on assignments and raised the bar for other students. Likewise, on group projects, she was a strong contributor.

Ability combined with hard work led to Ms. Hess's classroom success. A focused and passionate student, Ms. Hess often came to office hours to discuss her writing projects and seek advice for improvement. She worked diligently from the beginning to the end of every assignment, and she was open to feedback from her instructors. Indeed, the two Writing Fellows who worked with Ms. Hess in small group sessions independently commented on her desire to learn and her consistently strong work product.

Because of her talent, work ethic, and experience, I asked Ms. Hess to apply to become a Writing Fellow for the 2017-2018 school year. Writing Fellows are a select group of students who assist in teaching and developing the curriculum for the first-year legal writing program. Because Writing Fellows directly impact the 1L experience at George Mason, the selection process is rigorous and competitive. The selection committee looks for students who demonstrate exceptional legal writing ability and who possess qualities indicating that they will be responsive and responsible employees, will be outstanding role models and mentors to the 1L students, and will work well as part of a team. Ms. Hess was an obvious choice.

Already a strong writer and an outstanding oral advocate, Ms. Hess proved to be an excellent Writing Fellow. Right away, she took on a leadership role as the chief architect of the pretrial writing problem. She and her colleagues created an entertaining and challenging problem involving the fair use defense to a copyright infringement claim. Ms. Hess even volunteered to teach in the unpopular 6:00 to 8:00 p.m. timeslot on Friday evenings.

Not surprisingly, Ms. Hess has continued to excel since graduating, *cum laude*, from law school in May 2018. She gained valuable experience while clerking on the Court of Special Appeals of Maryland. In her short time at Faegre Drinker Biddle & Reath, Ms. Hess has received extensive professional-development training and worked on an array of litigation matters from *habeas corpus* petitions to settlement agreements. She is familiar with many procedural intricacies in federal courts and hopes to further educate herself as a judicial clerk.

Suzanne FitzGerald - sfitzg11@gmu.edu

I recommend Ms. Hess to you without qualification or hesitation. Please contact me by phone (703-993-9679) or email (sfitzg11@gmu.edu) if I can provide you with further information.

Sincerely yours,

Suzanne M. FitzGerald
Director, First Year Program
Legal Research, Writing, and Analysis
Antonin Scalia Law School
George Mason University

MEMORANDUM

TO: [Redacted]

FROM: [Redacted]

DATE: March 9, 2020

RE: Legal Memorandum Regarding [Redacted, hereinafter "X"] Harassment and Retaliation Claims

X claims that she experienced sexual harassment in the workplace, which later resulted in retaliatory conduct by [Redacted, hereinafter "Superior A"] and [Redacted, hereinafter "Superior B"]. The legal framework for each claim is set forth, below.

I. Sexual Harassment Under Connecticut Law Appears Broadly Defined, but Any Resulting Hostile Work Environment Claims Still Require Severe and Pervasive Misconduct In Order To Be Actionable.

It is discriminatory "[f]or an employer, by the employer or the employer's agent . . . to harass any employee . . . on the basis of sex or gender identity or expression." Conn. Gen. Stat. § 46a-60(b)(8). Under Connecticut law, "sexual harassment" means "any unwelcome sexual advances or requests for sexual favors or any conduct of a sexual nature when (A) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (B) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (C) such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment." Conn. Gen. Stat. § 46a-60(b)(8).

Prong (C) acts as the basis for a "hostile work environment" claim. Courts interpreting the Connecticut Fair Employment Practices Act ("CFEPA"), Conn. Gen. Stat. § 46a-60 *et seq*, "look to

federal law for guidance in interpreting state employment discrimination law, and analyze claims under [CFEPA] in the same manner as federal courts evaluate federal discrimination claims." *Jackson v. Walter Pollution Control Auth. Of City of Bridgeport*, 278 Conn. 692, 705 n. 11 (2006) (internal citation omitted).

Though "conduct of a sexual nature" that "has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment," Conn. Gen. Stat. § 46a-60(b)(8), can result in a hostile work environment claim, such conduct must be sufficiently severe and pervasive to be cognizable. *Sacco v. Legg Mason Inv. Counsel & Trust Co., N.A.*, 660 F. Supp. 2d 302, 314 (D. Conn. 2009) (quoting *Murray v. New York Univ. Coll. Of Dentistry*, 57 F. 3d 243, 249 (2d Cir. 1995)). *Accord Feliciano v. Autozone, Inc.*, 316 Conn. 65, 85 (2015) (quoting *Patino v. Birken Mfg. Co.*, 304 Conn. 679, 699 (2012)). Thus, although X did not assert a hostile work environment claim against [Redacted, hereinafter "Employer"], it is worth noting that such claims can be difficult to bring, as isolated incidents of discriminatory conduct are insufficient, *White v. City of Middletown*, 45 F. Supp. 3d 195, 211 (D. Conn. 2014), and a court will look at all the circumstances in a case. *Feliciano*, 316 Conn. at 85.

An additional portion of Connecticut law worth noting: "If an employer takes immediate corrective action in response to an employee's claim of sexual harassment," the corrective action cannot "modify the conditions of employment of the employee making the claim of sexual harassment unless such employee agrees, in writing, to any modification in the conditions of employment." Conn. Gen. Stat. § 46a-60(b)(8). An employer's "corrective action" "includes, but is not limited to, employee relocation, assigning an employee to a different work schedule or other substantive changes to an employee's terms and conditions of employment." *Id.*

Therefore, any response to X's claim of sexual harassment must be measured against this provision of Connecticut law.

II. Though her Retaliation Claim Would Likely Ultimately Fail, Initially X May Be Able to Make a Prima Facie Retaliation Claim Against Employer, Which Would Require Employer to Offer Non-Retaliatory Reasoning for Any Allegedly Adverse Employment Actions Against Her.

It is unlawful for an employer "to discharge, expel or otherwise discriminate against any person because such person has opposed any discriminatory employment practice or because such person has filed" a formal complaint or is involved with an official proceeding involving alleged discrimination. Conn. Gen. Stat. § 46a-60(b)(4). *Marini v. Costco Wholesale Corp.*, 64 F. Supp. 3d 317, 332 (D. Conn. 2014) ("CFEPA retaliation claims 'are analyzed under the same burden-shifting framework established for Title VII cases." (quoting *Widomski v. State Univ. of New York (SUNY) at Orange*, 748 F.3d 471, 476 (2d Cir. 2014))).

Retaliation claims involve a burden shifting framework. *Kaytor v. Electric Boat Corp.*, 609 F.3d 537, 552 (2d Cir. 2010). An employee must first establish a prima facie case of retaliation. *Id.* If she is successful, the burden shifts to the employer to offer a non-retaliatory reason for its actions. *Id.* at 552–53. If the employer produces evidence of non-retaliatory reason, then the employee must produce evidence "sufficient to permit an inference that the employer's proffered non-retaliatory reason is pretextual, and that retaliation was a substantial reason for the adverse employment action." *Id.* at 553 (internal citations and quotations omitted).

Here, X's retaliation claim would likely *ultimately* fail because there exists little evidence that Employer took any employment action that was materially adverse to X after she complained about the alleged harassment. However, because an employee's burden in establishing a prima facie retaliation case is minimal, and because retaliation claims are meant to cover a broad range of employer conduct, Employer faces a risk of lengthy litigation to dispose of X's retaliation claim because she may be able to make out an initial prima facie case. *See Tepperwien v. Entergy Nuclear Operations, Inc.*, 663 F.3d 556, 567–68 (2d Cir. 2011) (noting anti-retaliation provisions are meant to cover a broad range of employer conduct); *Hicks v. Baines*, 593 F.3d 159, 164(2d Cir. 2010)

(explaining plaintiff's low burden in establishing a prima facie retaliation case); *Bucalo v. Shelter Island Union Free School Dist.*, 691 F.3d 119, 128–29 (2d Cir. 2010) (noting that retaliation claims involve questions of fact for a jury, and that plaintiff's burden in making her prima facie case is "not onerous") (internal citations and quotations omitted).

Here, X complained to HR, Employer knew of the harassment complaint, and then soon after she complained and in the months that followed, some of X's duties were assumed by a new employee and Superior A and Superior B allegedly exhibited harassing behavior, including Superior A's text message communications sent in contravention of Employer's directive. Accordingly, Employer would need to offer evidence of non-retaliatory reasoning for the actions X alleges are retaliatory and adverse to her. If Employer could successfully show non-retaliatory reasoning, X would then have to exhibit that retaliation truly was a substantial reason for adverse employment actions taken against her.

A. Prima Facie Claim

To establish a prima facie case of retaliation, a plaintiff must show (1) that he or she participated in an activity protected under the CFEPA; (2) that the "participation was known to [his or her] employer[;] (3) that [plaintiff's] employer thereafter subjected [him or her] to a materially adverse employment action[;] and (4) that there was a causal connection between the protected activity and the adverse employment action." *Kaytor*, 609 F.3d at 552. *Accord Ciccone v. Demers Exposition Services, Inc.*, 2017 WL 6262209, at *7 (Conn. Sup. Ct. Nov. 9, 2017).

"Protected activity" under the statute includes, among other things, filing formal discrimination charges, informally protesting discrimination, and complaining to management. *Ciccone*, 2017 WL 6262209, at *7 (quoting *Matima v. Celli*, 228 F.3d 68, 78–79 (2d Cir. 2000)). Employment actions are "materially adverse" when they are "'harmful to the point that they could . . . dissuade a reasonable worker from making or supporting a charge of discrimination.'" *Hicks*, 593

F.3d at 165 (2d Cir. 2010) (quoting *Burlington Northern and Sante Fe Ry. Co. v. White*, 548 U.S. 53, 57 (2006). "Materially adverse employment action" could include termination, demotion, diminished material responsibilities, a material loss of benefits, etc. *Ciccone*, 2017 WL 6262209, at *7 (quoting *O'Bar v. Naugatuck*, 260 F. Supp. 2d 514, 516–17 (D. Conn. 2003)). "Material adversity is . . . determined objectively, based on the reactions of a reasonable employee," but courts still consider the specific factual context of each case. *Tepperwien*, 663 F.3d at 568. To be materially adverse, the employment action must be "one which is more disruptive than a mere inconvenience or an alteration of job responsibilities." *Vega v. Hempstead Union Free School District*, 801 F.3d 72, 85 (2d Cir. 2015). Courts consider alleged acts of retaliation "'both separately and in the aggregate, as even minor acts of retaliation can be sufficiently "substantial in gross" as to be actionable.'" *Boucher v. Saint Francis GI Endoscopy, LLC*, 187 Conn. App. 422, 431 (Conn. App. 2019) (quoting *Hicks*, 593 F.3d at 165).

As a general matter, criticism of an employee is not an adverse employment action, nor are empty verbal threats or a supervisor's angry demeanor. *Tepperwien*, 663 F.3d at 570; *Boucher*, 187 Conn. App. at 436–37. "[U]nchecked retaliatory co-worker harassment," however, "if sufficiently severe," can constitute materially adverse employment action. *Rivera v. Rochester Genesee Regional Transp. Authority*, 743 F.3d 11, 26 (2d Cir. 2014) (internal citations and quotations omitted).

In the situation involving X, she can likely claim that she was legitimately participating in an activity protected under CFEPA. She does not need to establish that the employment practice she was opposing was actually unlawful; rather, she need only have a "good faith, reasonable belief" that it was unlawful. *Christy v. Ken's Beverage, Inc.*, 660 F. Supp. 2d 267, 276 (D. Conn. 2009) ("To demonstrate that she engaged in a protected activity, Plaintiff must show that she 'had a good faith, reasonable belief that the underlying employment practice was unlawful.'" (quoting *Reed v. A.W. Lawrence & Co.*, 95 F.3d 1170, 1178 (2d Cir. 1996)). As to the second element, it is hard to dispute

that Employer knew that X was opposing its employment practices, as she formally complained to HR and her supervisors, including Superior A and Superior B, were aware of the complaints.

As indicated in the demand letter, X will attempt to use the assumption of some of her responsibilities by the new employee, [Redacted, hereinafter "Y"], as evidence of a materially adverse employment action. *Sacco*, 660 F. Supp. 2d at 314 ("Unquestionably, a change in job responsibilities is a material change in the terms of employment that can support a retaliation claim."). Though diminished material responsibilities can constitute a materially adverse employment action, initial interviews indicate that Employer could point to evidence that the responsibilities assumed by Y were not material, X did not want those responsibilities in the first place, and allowing Y to assume these responsibilities was not retaliatory. Additionally, initial interviews have revealed that X did not experience any real diminution in salary compared to her peers, nor would Superior A's and Superior B's occasional hostile behavior suffice. X would likely also argue that Superior A's continued alleged harassment of her after she complained to HR and Superior A's and Superior B's behavior toward her constituted materially adverse employment actions. *Rosario v. Brennan*, 197 F. Supp. 3d 406, 410 (D. Conn. 2016) (alleging continued harassment after complaining about harassment is enough to survive a motion to dismiss). Continuous nitpicking, heightened scrutiny, and assignment of undesirable, arduous work tasks can, depending on the circumstances in a given case, establish a prima facie case of retaliation. *White*, 45 F. Supp. 3d at 218.

She then may note that all of these allegedly adverse actions began occurring after she complained to HR. *Kaytor*, 609 F.3d at 553 (noting a plaintiff may point to "[c]lose temporal proximity" between a protected action and the employer's adverse employment action "to establish the requisite causal connection between the protected activity and retaliatory action").

B. Burden Shifting to Employer, then Back to Employee

Even if she successfully makes a prima facie claim of retaliation, however, the burden then shifts to Employer to provide a legitimate reason for taking these employment actions against her. *Ciccone*, 2017 WL 6262209, at *8. If Employer produces evidence of a legitimate reason for its actions, the burden would shift back to X to prove that Employer truly "acted with a retaliatory motive or animus." *Id. Accord Kaytor*, 609 F.3d at 553.

Based on the facts we know, X's claim likely would not prevail, though we would require additional fact development to have a truly robust understanding of her claim. Regardless, sufficient risk exists that X could embroil Employer in a retaliation suit in which she could at least make out an initial prima facie case.

Applicant Details

First Name	**John**
Middle Initial	**M**
Last Name	**Hindley**
Citizenship Status	**U. S. Citizen**
Email Address	**jhindley@law.gwu.edu**
Address	**Address** Street **2001 N. Adams Street, #730** City **Arlington** State/Territory **Virginia** Zip **22201** Country **United States**
Contact Phone Number	**4018291104**

Applicant Education

BA/BS From	**Providence College**
Date of BA/BS	**May 2017**
JD/LLB From	**The George Washington University Law School** **https://www.law.gwu.edu/**
Date of JD/LLB	**May 17, 2020**
Class Rank	**15%**
Law Review/Journal	**Yes**
Journal(s)	**The George Washington Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Van Vleck Moot Court Competition** **1L Internal Moot Court Competition**

Bar Admission

Admission(s)	**District of Columbia**

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Peterson, Todd
tpeter@law.gwu.edu
(703) 768-5813
Lawrence, Kupers
kupdog1@gmail.com

References

Professor Todd Peterson
Carville Dickinson Benson Research Professor
The George Washington University Law School
(202) 994-1004
tpeter@law.gwu.edu

Professor David Fontana
Samuel Tyler Research Professor
The George Washington University Law School
(202) 994-0577
dfontana@law.gwu.edu

Mr. Larry Kupers
Former Director
Law Students in Court-Criminal Division
(202) 590-0905
kupdog1@gmail.com

Mr. Andrew Tutt
Senior Associate
Arnold & Porter Kaye Scholer, LLP

(202) 942-5242
andrew.tutt@arnoldporter.com
This applicant has certified that all data entered in this profile and any application documents are true and correct.

John M. Hindley

2001 N. Adams Street, Apt. 730, Arlington, VA 22201 | (401) 829-1104 | jhindley613@gmail.com

June 13, 2021

The Honorable Elizabeth W. Hanes
U.S. District Court
Eastern District of Virginia
701 East Broad Street
Richmond, VA 23219

Dear Magistrate Judge Hanes:

I am writing to apply for a clerkship position in your chambers for the 2022-24 Term. I am currently an associate at Arnold & Porter Kaye Scholer LLP in its general litigation group. I graduated from The George Washington University Law School in May 2020 and I am a member of the District of Columbia Bar.

As part of my career trajectory, I hope to serve as a federal prosecutor. I began my career at Arnold & Porter in order to gain familiarity with criminal and civil investigations and trial preparation through a private sector lens. Serving as a clerk is a critical step towards my career goal. It would be an invaluable opportunity to not only improve my writing and learn about various substantive and procedural matters, but also to observe the advocacy skills of attorneys who argue before your court, particularly in criminal matters. My experience at Arnold & Porter has prepared me to be a supportive member of your chambers who can effectively collaborate with you and the other clerks, quickly integrate feedback in my writing and research, and help manage your overall docket. In addition, I consider my interpersonal skills to be a particular strength, allowing me to professionally and articulately communicate with others both inside and outside of your chambers.

I am enclosing a resume, two transcripts, and a writing sample. Attached are recommendation letters written by Professor Todd Peterson and Mr. Larry Kupers.

Please let me know if I can provide any additional information. I can be reached by phone at (401) 829-1104 or by email at jhindley@law.gwu.edu. Thank you very much for considering my application.

Sincerely,

John Hindley

John M. Hindley

2001 N. Adams Street, Apt. 730, Arlington, VA 22201 | (401) 829-1104 | jhindley@law.gwu.edu

WORK EXPERIENCE

Arnold & Porter Kaye Scholer LLP, Washington, D.C.
Associate, *General Litigation Group*, Jan. 2021–Present; Summer Associate, May-July 2019

Products Liability - Handle matters concerning pre-trial discovery on a state-level products liability team. Draft discovery dispute letters regarding deficiencies in the opposing party's document production and interrogatory responses. Draft memorandum analyzing the state-law claims made against the client and the likelihood of recovery. Observe proceedings before a special master tasked with resolving discovery disputes. Serve as the state-team liaison updating other state teams of discovery developments. Draft memorandum analyzing whether, under state law, the client has a jury trial right for the opposing party's state law claims.

Commercial - Draft memoranda describing how the client in an accounting malpractice case can minimize its damages under state-law comparative liability or successive liability theories, whether the client can claim privilege during discovery, and whether the client could remove the case to federal court. Research backgrounds of potential discovery referees and the opposing party's experts. Conduct cite, edit, and substantiation checks of motions and appellate briefs.

Investigations - In an antitrust investigation, observe interview of client as part of the employer hospital's investigation of alleged no-poach agreements. Draft memorandum summarizing what was discussed as part of the interview. In a False Claims Act investigation, code documents as part of the client's document production for the government.

Appellate/Administrative- Brief section of a pro bono Sixth Circuit criminal appeal arguing that the client's conviction does not qualify as a crime of violence. Represent and counsel client who was denied unemployment benefits from the Virginia Employment Commission in an administrative appeal of the appeals examiner's decision.

Advisory Writing - Draft client advisories for the Securities Enforcement and White Collar groups.

Rising for Justice, Washington, D.C.
Student Attorney, Aug.–Dec. 2019
Represented a low-income client who was charged with a misdemeanor. Drafted and submitted motions to, and argued them before, the Superior Court for the District of Columbia. Prepared for a bench trial, interviewed witnesses, and gathered evidence for client's criminal defense.

Todd D. Peterson, Carville Dickinson Benson Research Professor, Washington, D.C.
Research Assistant, Nov. 2018–May 2020
Conducted substantive legal research on personal jurisdiction and separation-of-powers issues

U.S. District Court, District of Columbia, Chambers of Judge Amy Berman Jackson, Washington, D.C.
Judicial Intern, May–July 2018

U.S. Attorney's Office for the District of Columbia, Washington, D.C.
Law Clerk, Jan.–Apr. 2019

U.S. Department of Justice, Criminal Division, Fraud Section, Washington, D.C.
Fall Intern, Sept.–Nov. 2018

EDUCATION

The George Washington University Law School, Washington, D.C.
Juris Doctor *with Honors*, GPA: 3.72, May 2020

- *George Washington Scholar* (Top 15% of the class)
- *The George Washington Law Review* (Articles Editor, Vol. 88); ADR Honor Board (Member), Dean's Recognition for Professional Development, Elected Member of the S.B.A. Senate (2019–20)
- Publication: *Time is Not the Enemy*, 88 GEO. WASH. L. REV. 1193 (2020) (Administrative Law Edition)

Providence College, Providence, R.I.
Bachelor of Arts, *Summa Cum Laude*, Political Science, Economics, May 2017

- Dean's List (every semester), *Pi Sigma Alpha* (Political Science Honor Society, Treasurer), *Omicron Delta Epsilon* (Economics Honor Society, Member)
- Class President (2013–14), Student Representative (Strategic Planning Committee, Academic Integrity Board, Centennial Celebration Committee), Retreat Leader
- Publication: *Let's Offer Alternatives to Payday Loans*, PROVIDENCE J. (Dec. 12, 2015)

INTERESTS

Cooking my grandmother's recipes, golfing, reading biographies, and going on morning runs.

Bar Admission: District of Columbia (January 2021)

John Hindley
The George Washington University Law School
Cumulative GPA: 3.722

Fall 2017

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Contracts I	Gabaldon	A	3	
Legal Research and Writing	Guthrie	A-	2	
Civil Procedure	Peterson	B+	3	
Torts	Schoenbaum	A-	4	
Criminal Law	Pustilnik	A+	3	

George Washington Scholar (top 1-15% of the class)

Spring 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Introduction to Advocacy	Guthrie	B+	2	
Property	Kieff	A-	4	
Constitutional Law I	Fontana	A	3	
Contracts II	L. Fairfax	A	3	
Civil Procedure II	Siegel	B+	3	

George Washington Scholar (top 1-15% of the class)
Deans Recognition for Professional Development

Fall 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Law Review	Clark	CR	1	
Government Lawyering	Goldsmith	A-	2	
Corporations	L. Fairfax	A	4	
Field Placement	Tillipman	CR	2	
Evidence	Braman	A-	3	
College of Trial Advocacy	Cohen	B	3	

George Washington Scholar (top 1-15% of the class)

Spring 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Administrative Law	Hammond	A-	3	
Advanced Field Placement	Johnson	CE	0	
Complex Litigation	Transgrud	CR	3	
Criminal Procedure	Drinan	B+	3	
Law Review	Clark	CR	1	
Professional Responsibility/ Ethics	Lee	A-	2	
Field Placement	Tillipman	CR	2	

George Washington Scholar (top 1-15% of the class)

Fall 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Moot Court-Van Vleck	Johnson	CR	1	Internal Moot Court Competition
Reading Group	Fontana	CR	1	Constitutional Issues in the Trump Administration
Law Review	Clark	CR	1	
Independent Legal Writing	Pierce	A+	1	
White Collar Crime	Eliason	A-	3	
Law Students in Court/ Criminal Division	Johnson	A	6	Legal Clinic

Spring 2020

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Adjudicatory Criminal Procedure	R. Fairfax	CR	3	
Separation of Powers	Peterson	CR	3	
Federal Courts	Clark	CR	4	
International Money Laundering	Laisch and Smith	CR	3	
Law Review	Clark	CR	1	

For the Spring 2020 semester, all courses are to be assigned CR/NC marks, with CR corresponding to C- or better had the work been letter-graded, and NC corresponding to lower than C- had the work been letter-graded. This policy is mandatory for all Spring 2020 courses and applies regardless of when the work for each course was completed.

The Bulletin provides that required courses, experiential courses, and courses to fulfill the writing requirement must be taken for letter grades. (E.g., Bull. at 12.) This requirement is waived for Spring 2020. However, students receiving an NC in a required course must still retake that course. (See Bull. at 15.)
The Bulletin provides that J.D. students must receive a B- or better on their legal writing requirement. (Bull. at 13.) For Spring 2020 only, the required mark is a CR which is a C- or better. However, instructors must ensure that the work is based on sound legal research, and meets the length, footnotes, and citation requirements.

The Bulletin provides that U.S. graduate students must receive a B+ or better on their written work requirement. (E.g., Bull. at 27.) For Spring 2020 only, the required mark is a CR which is a C- or better. However, instructors must ensure that the other written work requirements relating to length, footnotes, and legal citation rules, are met.

The Bulletin provides that typically, students who drop courses after the Add/Drop period but prior to eleven weeks of study receive a mark of NC on their transcripts (Bull. at 17-18, 42.) For Spring 2020 only, any such drops will be indicated on the student's transcript with a "W" to avoid the misperception that the student took the course but failed to meet the criteria meriting a mark of CR. The eleven-week limitation remains in effect for Spring 2020.
The Bulletin establishes limits on the number of hours J.D. students may choose to take on a CR/NC basis. (E.g., Bull. at 18.) Any such elections made in Spring 2020 shall not count toward those limits, even if the elections were made prior to the announcement of the mandatory CR/NC policy. Nor shall any CR/NC marks received in Spring 2020 count toward those limits.
Similarly, the Bulletin's minimum number of letter-graded hours for J.D. and transfer students (Bull. at 11) shall be adjusted so that course hours taken in Spring 2020 are subtracted from those values.

The Bulletin provides that graduate students may not elect to take graded courses for CR/NC. (Bull. at 40.) This provision is waived for Spring 2020.

The Bulletin provides that students who fail to take an exam are awarded a grade of F unless excused by the Dean of Students or permitted to drop the course. (Bull. at 18.) For Spring 2020, failure to take an exam without excuse or permission to drop will result in a mark of NC. The provisions for graduate

students are to be modified in the same fashion. (Bull. at 41.)
The Bulletin provides that where coursework is graded by methods other than exams and a student receives an extended deadline as contemplated in the Bulletin, a student who fails to complete the coursework is awarded an F. (Bull. at 19.) For Spring 2020, failure to complete the coursework under these circumstances will result in a mark of NC. The provisions for graduate students are to be modified in the same fashion. (Bull. at 41-42.)
The Bulletin provides that J.D. students receiving more than two NCs over the course of study are excluded from further study unless they petition, and receive permission from, the Academic Scholarship Committee (Bull. at 20.) This rule remains in effect, as does the single-NC rule for graduate students. (Bull. at 27.)

The Bulletin provides that students taking courses at other GW schools for credit toward their J.D. must earn a mark of at least B- to receive corresponding CR in the Law School. (Bull. at 22, 24.) For Spring 2020, such students must meet the criteria for CR applicable in that other school's academic program for Spring 2020. The same modified policy applies to graduate students taking non-Law School courses toward their LLM degrees (Bull. at 39), and MSL degrees (Bull. at 42).

Grading System Description

Grading System and Academic Recognition Policy

The George Washington University Law School provides letter grades (A+, A, A-, B+, B,B-, C+, C, C-, D, F) and calculates grade point average on a 4.0 scale (A+ = 4.33).

The majority of courses are graded on a letter-grade basis, but for a small number of courses, primarily those that are clinical or skills-oriented, the grade of CR (Credit) or NC (No Credit) is given or the following grading scale is used: H (Honors), P (Pass), LP (Low Pass), and NC (No Credit). For Honors, a student must do work of excellent quality, and no more than 25 percent of the class may earn this grade.

Students of The George Washington University Law School are not supplied with individual class rankings. However, in lieu of specific rankings, students' relative academic accomplishments are represented through two scholar designations.

Students in the top 1 % - 15% of the class (based on cumulative GPA at the end of each semester) are designated "George Washington Scholars," and students in the top 16% - 35% of the class (based on cumulative GPA at the end of each semester) are designated "Thurgood Marshall Scholars."

An exception to this academic recognition policy has been made for George Washington Scholars and Thurgood Marshall Scholars who are applying for judicial clerkships using OSCAR. Those students are allowed to obtain and disclose their rankings in their OSCAR profiles within the more specific percentile cutoffs listed in OSCAR (i.e. top 5, 10, 15, 20, 25, 30, 33 and 50%). All other students can simply denote "I am not ranked."

Once students graduate, their transcripts typically reflect their final class rank. In addition students may graduate "With Highest Honors" (top 3 %), "With High Honors" (top 10 %) and "With Honors" (top 40%)."

John Hindley
Providence College
Cumulative GPA: 3.87

Fall 2013

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Politics		A	3	
International Relations		A-	3	
Development of Western Civilization		A-	4	
Writing Seminar		A	3	
Development of Western Civilization Seminar		NG	0	

Dean's List
Good Standing

Spring 2014

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Empirical Political Analysis		B+	3	
Math Business Analysis II		A	3	
Development of Western Civilization Seminar		NG	0	
Development of Western Civilization		A-	4	
Comparative Politics		A	3	
Principles of Economics - Macro		A	3	

Dean's List
Good Standing

Fall 2014

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Logic		B	3	
Development of Western Civilization		A-	4	
Public Administration		A	3	
Introduction to Statistics		A-	3	
Development of Western Civilization Seminar		NG	0	
Principles of Economics - Micro		A	3	

Dean's List
Good Standing

Spring 2015

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Development of Western Civilization Colloquium Seminar		NG	0	

Biblical Theology	A	3
Economics of Developing Nations	A	3
Development of Western Civilization Colloquium	A	4
American Public Policy	A	3
Microeconomic Analysis	A-	3

Dean's List
Good Standing

Summer 2015

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Ethics, Moral Leadership, and the Common Good		3	B+	

Good Standing

Fall 2015

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Democratic Theory		A	3	
Intro Econometrics with Lab		A	4	
Political Science Internship		A	3	
Macroeconomic Analysis		A	3	
Catholic Social Thought		A	3	
Catholic Imagination in American Film		A	3	

Dean's List
Good Standing

Spring 2016

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Washington Semester/ American Gov't and Politics Internship		A	4	
Washington Semester/ American Gov't and Politics Seminar I		A	4	
Washington Semester/ American Gov't and Politics Research Project		A	4	
Washington Semester/ American Gov't and Politics II		A	4	

Dean's List
Good Standing

Fall 2016

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Economics Senior Capstone		A	3	
Public Finance		A-	3	
Independent Study		A	3	

The African World View	A	3

Good Standing
Dean's List

Spring 2017

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Capstone: American Political Dysfunction		A	3	
Health Economics		A	3	
Labor Economics		A	3	
Environmental Biology		A	3	

Dean's List
Good Standing
Omicron Delta Epsilon
Pi Sigma Alpha
Summa Cum Laude
Class Rank: 35 out of 950

Grading System Description

The combined results of examinations, assignments, classroom participation, and general evidence of regular and consistent application determine a student's standing in each subject. In grading, it is the responsibility of each member of the teaching faculty to give due weight not only to the degree of mastery of the subject matter manifested by the student in examination, but likewise to the degree of originality, correctness in expression, and conformity with approved forms for written assignments. The quality of work is indicated by the grading system.

Quality Grade Points

Quality grade points determine the student's grade point average (GPA). They are a measure of the quality of course work completed, while credit hours are a measure of each course's weighted value. For example, a student earns the following grades: 3-credit "A", 3-credit "B", 3-credit "C", and 5-credit "B". The quality points are computed as 3-credit "A" (12 quality points), 3-credit "B" (9), 3-credit "C" (6), and 5-credit "B" (15). The quality point average is 42 (total quality points) divided by 14 (total averaged credit hours), which equals 3.00. (Note: the "cumulative" quality point average or "cumulative" grade point average includes all courses in the student's academic record.) See Grade/Quality Points Chart for specific details regarding the number of quality points assigned for specific grades.

Grade/Quality Points Chart

Standard Honors Courses
A Superior 4.00 points per each credit hour completed 4.00 points per each credit hour completed
A- 3.67 points per each credit hour completed 3.84 points per each credit hour completed
B+ Very Good 3.33 points per each credit hour completed 3.50 points per each credit hour completed
B Good 3.00 points per each credit hour completed 3.17 points per each credit hour completed
B- 2.67 points per each credit hour completed 2.84 points per each credit hour completed
C+ Above Average 2.33 points per each credit hour completed 2.50 points per each credit hour completed
C Average 2.00 points per each credit hour completed 2.17 points per each credit hour completed
C- 1.67 points per each credit hour completed 1.84 points per each credit hour completed
D+ Passing 1.33 points per each credit hour completed 1.50 points per each credit hour completed
D Low Passing 1.00 points per each credit hour completed 1.17 points per each credit hour completed
D- 0.67 points per each credit hour completed 0.84 points per each credit hour completed
F Failure 0.00 points per each credit hour completed

P (Pass) Passing in Pass/Fail Course; this grade is not computed in the GPA.
AU (Audit) Student attends class in non-credit capacity; this grade is not computed in the GPA.
I (Incomplete) Incomplete; becomes "NF" if not completed by mid-semester date of the following semester.
LB (Lab Course) Non-credit lab courses receive an auto-grade of "LB."
NF (Not Finished) Course not finished within required time; this grade earns 0.00 quality points per credit hour.
NG (Not Graded) Auto-grade of "NG" given to courses in which the co-requisite course is graded.
NM (No Mark) Instructor has not submitted grade; becomes "NF" if not resolved by mid-semester date of the following semester.
WD (Withdrawal) Approved withdrawal from a course; this grade is not computed in the GPA.

The George Washington University Law School
2000 H Street, NW
Washington, DC 20052

June 13, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am delighted to write to you on behalf of John Hindley, who has applied for a clerkship position with you. John is a 2020 graduate of The George Washington University Law School. During his first semester at GW Law, he was a student in my Civil Procedure I class, which was a small section of 36 students and which included a midterm exam as well as a final exam. In addition, during his second year, John served as an upper level student advisor to the Benjamin Cardozo Inn of Court, for which I am the principal faculty advisor. Because of John's terrific work in class and with the Cardozo Inn, I asked him to be my research assistant. As a result I am very familiar with John's work and his exceptional legal abilities. Based on my knowledge of John's work in class, with the Inns of Court Program, and as my research assistant, I think that he is a superb candidate for a judicial clerkship.

John's success in law school was preceded by an outstanding undergraduate career. As a summa cum laude grad of Providence College, John looked like someone who would do well in law school, and he fulfilled the promise of his top-flight undergraduate credentials during his time at GW Law. John was an excellent student in my Civil Procedure class. John was consistently well prepared for class, and he responded exceptionally well to difficult Socratic questioning. He finished with the highest B+ grade in the class, and I would have given him an A if our rigorous mandated curve had allowed it. As it turned out, my grade was the worst grade John received that semester, and he continued to do exceptionally well academically. As a George Washington Scholar, he was in the top 1-15% of his class, and he received terrific grades from professors who are renowned for being tough graders. Given how he did in other classes, I fear I gave him far too low a grade in Civil Procedure I. John clearly has one of the best analytical minds in his class.

Equally important in my view, John really understands the importance of taking responsibility for his own professional development as a lawyer. John received the Dean's Recognition for Professional Development, which indicates that John successfully completed all of the required elements of the GW Law Foundations of Practice program. The voluntary activities that are part of this program relate to the development of a strong professional identity and the self-directed development of critical professional skills that are not typically taught in the first-year doctrinal classroom. I believe that John's inclusion in the 20% of students who completed all of the Foundations Program requirements shows that he not only was devoted to classroom work, but he also had a mature and professional understanding of the broad range of skills that lawyers need to be successful. Because John understands the importance of professional development education, he was selected to be an upper level advisor in our Inns of Court program, which is the core of the Foundations of Practice program. He was an invaluable part of the Cardozo Inn advisory team, and he was a huge asset to last year's 1L students as they worked through the program.

John's work as my research assistant was consistently outstanding. He is a tireless and effective researcher, and he writes exceptionally well. He went beyond the assignments I gave him and found important sources that I wasn't even aware that I needed but that proved to be invaluable to my own writing. I was delighted that he continued to be my research assistant through the summer and into his last year at GW Law.

Finally, I think that John is also blessed with great judgment and maturity. I also believe that he will be a wonderful colleague who will improve the working environment wherever he is employed. I have no doubt that he is headed for a stellar legal career and will be an alumnus of whom GW Law will be justly proud. I recommend him to you with the greatest enthusiasm.

Sincerely,

Todd David Peterson
Carville Dickinson Benson Research Professor and
Professor of Law

Todd Peterson - tpeter@law.gwu.edu - (703) 768-5813

June 13, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I write to recommend John Hindley as an outstanding candidate for a clerkship position. John was one of the students I supervised when I worked for the nonprofit, Rising for Justice (formerly DC Law Students in Court), as the Director of the Criminal Division. Rising for Justice operates a criminal defense clinic for DC law students.

John took part in our Criminal Defense Clinic during the Spring semester of 2019. As his supervisor, I worked very closely with him. Our clinic is rigorous and demanding. Each student becomes the lead attorney for an indigent client facing one or more misdemeanor charges in D.C. Superior Court. At the beginning of the semester, our students attend an intensive week of seminars on client-centered representation, investigation of a criminal case, relevant substantive law, and trial skills. During the semester, our students attend weekly two-hour seminars aimed at improving their litigation skills partly through speaker presentations and partly through exercises in which the students practice the skills taught. Each student meets with his or her supervisor for at least an hour per week but typically much more, especially when the student is gearing up for a trial. As student attorneys, our students are expected to take the lead role in defending their clients.

John excelled in our program. He was assigned a challenging case on the domestic violence docket and faced a difficult client. The client was charged with simple assault, alleged to have pushed his fiancée during a dispute. The client was not cooperative, having served a prison term for drug dealing and left prison with diagnosed mental health issues. The client was wary of lawyers and met with us only at scheduled court hearings. But John was steadfast in his efforts to develop rapport with our client. John did an excellent job with the investigation of the case, directing the efforts of another student in the program who was assigned as our case investigator. John also excelled at pretrial litigation, filing several substantive motions. He has solid legal-analytical and writing skills and can be depended upon for high quality legal work.

Our client elected to go to trial. In D.C. Superior Court, the practice is for most if not all pretrial motions to be heard and adjudicated on the day set for trial. On that day, John masterfully argued the motions he had filed. He convinced the judge that evidentiary hearings were required on two of the motions filed. The trial then had to be delayed so that the government could collect its witnesses. The judge was clearly impressed with how John handled himself in the courtroom. Perhaps more importantly, a client who had been very skeptical of his legal representation to that point enthusiastically praised John for his performance and made it clear that he was extremely pleased to have John representing him.

John was one of our very best students that semester. Beyond his legal skills, he demonstrates good judgment and is mature beyond his years. I have no doubt he is heading into what will be an accomplished legal career. I recommend him without reservation.

Please feel free to contact me with any questions. My cellphone is: (202) 590-0905.

Sincerely,

Larry Kupers

Kupers Lawrence - kupdog1@gmail.com

John M. Hindley

2001 N. Adams Street, Apt. 730, Arlington, VA 22201 | (401) 829-1104 | jhindley@law.gwu.edu

WRITING SAMPLE

This sample is a motion that I drafted when serving as a student attorney with Rising for Justice, a criminal defense legal clinic. I represented a client who was charged with misdemeanor Simple Assault. During the course of my representation, I sought to either dismiss my client's case or introduce hearsay evidence at trial based on the police officers' alleged violations of *Brady v. Maryland*. In the sample, I omitted the section arguing that there was an *Arizona v. Youngblood* violation and the section discussing the appropriate remedies for the violation. Additionally, I removed all of my client's identifying information and changed the names of all the individuals involved in the dispute that gave rise to the *Brady* claim.

Please let me know if you would like a copy of the motion in its entirety, or any further writing samples.

MOTION TO DISMISS FOR *BRADY* VIOLATIONS

Mr. John Doe, through his undersigned attorneys, respectfully moves this Court to dismiss the above-captioned case with prejudice or, in the alternative, order the admission of the hearsay testimony of a missing witness. This sanction is requested because the government violated the rule of *Brady* by failing to obtain and disclose the identification information of a witness who was at the scene of Mr. Doe's arrest and shared exculpatory information with the arresting officers. *See Brady v. Maryland*, 373 U.S. 83 (1963). Body Warn Camera ("BWC") footage shows the unknown witness providing the responding officers with exculpatory information. The identity of the unknown witness should have been obtained by the officers and disclosed to Mr. Doe.

BACKGROUND

At the time Mr. Doe was being arrested, there was a witness that unequivocally and unreservedly told members of the Metropolitan Police Department ("MPD") that Mr. Doe did not touch the complaining witness, negating guilt.

Mr. Doe was arrested on August 17, 2019, at the corner of A Street, SE and Minnesota Avenue, SE, Washington, D.C. *See* Arrest Affidavit at 6. He was charged with simple assault under D.C. Code § 22-404. *See* Information. The government alleges that, during an argument between Mr. Doe and the complaining witness, Mr. Doe "pushed" her. *Id.* The complaining witness did not sustain any injuries or require medical attention.

Mr. Doe filed a Notice with the Court on September 4, 2019 containing Mr. Doe's *Rosser* letter requesting evidence from the government under, *inter alia*, *Brady v. Maryland*, by September 30, 2019. The *Rosser* Letter made "a general request for all exculpatory information . . . [including] information known to the government . . . which is favorable to the defense . . . [and] material to the issue[] of guilt . . . ." Notice of Filing at 9. Specifically, the *Rosser* Letter requested

"[a]ll information in the possession of the government regarding any witnesses found that contradict any police paperwork when they canvassed for witnesses on August 17, 2019." *Id.* At the September 20, 2019 initial status hearing, the Court ordered the government to provide Mr. Doe with all relevant Body Worn Camera ("BWC") footage by October 16, 2019. On October 3, 2019, the government responded to Mr. Doe's *Rosser* Letter but did not include any "information . . . regarding any witnesses found that contradict any police paperwork when they canvassed for witnesses" as requested in Mr. Doe's *Rosser* Letter.

On October 16, 2019, the government complied, in part, with the Court's order by dumping Mr. Doe with hours of BWC footage. One of the BWC videos is from the camera attached to MPD Officer Samuel Jones. *See* Jones BWC. He pulled a witness aside after Mr. Doe was arrested to ask her about what she saw. *See id.* at 5:00–03. The witness is an African American woman with dread locks that are dyed red. She advised the officer that she was standing near Mr. Doe and the complaining witness during their argument and witnessed the entire incident. *See id* at 5:07. She also informed the officer that "[Mr. Doe] never hit her." *Id.* She said that the complaining witness and Mr. Doe were arguing. *See id.* at 5:23–30. She recognized the complaining witness and Mr. Doe because they "live up the street." *Id.* at 5:41–43. She repeated, "he never hit her because I was standing here the whole time." *Id*. at 5:49–52.

Officer Jones made a feeble attempt at obtaining a witness statement by asking the missing witness from afar, as she was already walking away, whether she wanted to complete a witness statement. *See* Jones BWC at 6:40. Based on the footage, it appears that she did not even hear Officer Jones's question. Similarly, Officer Joshua Miller made a similarly half-hearted attempt to secure a witness statement in order to "get her on false statements." *See* Jones BWC at 6:38–48. Officer Miller, in his "attempt" to get a witness statement, tells the missing

witness that "you need to back off our crime scene." Miller BWC at 6:00–02. In the midst of Officer Miller's confrontation with the witness, it does not appear that what the witness said to Officer Miller was responsive to his question. The footage does not show the missing witness making an affirmative "no" to Officer Miller's question as to whether she wanted to fill out a witness statement. *See* Miller BWC at 5:53–6:03. Officer Miller's actions intimidated the missing witness into walking away. Rather than making a good faith effort in obtaining her information for a witness statement, Officer Miller ensured a statement could not be taken.

During a conversation between Officers Jones and Miller, Officer Jones said, "she can do false statements all day." *Id.* at 7:00–02. Another BWC recording showed Officer Anthony Davis telling the other officers, including Officer Jones, to let the witness go because the complaining witness "doesn't even know her." *See* Davis BWC at 6:26.

ARGUMENT

I. THE GOVERNMENT VIOLATED THE RULE OF *BRADY*.

The United States Supreme Court was unequivocal and unambiguous when it held, under the Fifth Amendment, that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to either guilt or to punishment, irrespective of the good faith of bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 83 (1963). Withholding exculpatory evidence allows the prosecutor to play "the role of an architect of a proceeding that does not comport with standards of justice" even when the prosecutor's action's "is not the result of guile." *Id.* at 88 (internal quotations and citations omitted). This rule is not merely a rule of discovery but a fundamental "rule of fairness and minimum prosecutorial obligation" governing all criminal proceedings. *Curry v. United States*, 658 A.2d 193, 197 (D.C. 1995) (citation and internal quotation omitted). This creates an obligation

for the government "to assist the defense in making its case" under *Brady*. *United States v. Bagley*, 473 U.S. 667, 675 n.6 (1985).

Brady violations, the defendant has to "show that evidence in question (1) 'is favorable to the accused'; (2) 'was possessed and suppressed by the government, either willfully or inadvertently;' and (3) is material to guilt or punishment." *Andrews v. United States*, 179 A.3d 279, 186–87 (D.C. 2018) (quoting *Vaughn v. United States*, 93 A.3d 1237, 1254 (D.C. 2014)). Meeting this criterion demonstrates that the government had a due process obligation to provide the defense with certain, exculpatory evidence.

A. The Information from the Missing Witness Is Both Exculpatory and Material.

Brady and its progeny have broadly defined the range of favorable material that the government must disclose in order to satisfy its due process obligations. The Fifth Amendment applies not only to evidence that clearly demonstrates that the defendant did not commit the charged act, but all information that "tend[s] to exculpate" the accused. *Brady*, 373 U.S. at 88. In other words, due process requires that the government provide information and evidence "'that would suggest to any prosecutor that the defense would want to know about it' because it helps the defense." *Vaughn*, 93 A.3d at 1254 (quoting *Miller v. United States*, 14 A.3d 1094, 1110 (D.C. 2001)). If there is any doubt as to what that means, the D.C. Court of Appeals gave this succinct standard for prosecutors: "defense perspective controls." *Id.* The government cannot evaluate the nature and strength of the government's case and "decide not to disclose information that is on its face exculpatory based on an assessment of how that evidence might be explained away or discredited at trial, or ultimately rejected by the fact finder." *Zanders v. United States*, 999 A.2d 149, 164 (D.C. 2010).

For the purposes of *Brady*, evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Miller*, 14 A.3d at 1115 (quoting *Bagley*, 473 U.S. at 682). "Reasonable probability" means "a probability sufficient to undermine confidence in the outcome." *Id.* (quoting *Bagley*, 473 U.S. at 682).[1] Ultimately, the court, when considering possible *Brady* violations, seeks to ensure that "the defendant received a fair trial." *Vaughn*, 93 A.3d at 1262.

Here, there is no doubt that the information is favorable because the missing witness would testify at trial that Mr. Doe did not hit the complaining witness. This testimony would be exculpatory because it would negate Mr. Doe's guilt as to whether he committed simple assault. Not only does this information "tend to exculpate" Mr. Doe, *Brady*, 373 U.S. at 88, the information, if deemed credible by the trier-of-fact, has the potential of creating a reasonable doubt as to Mr. Doe's guilt.

In the same vein, the testimony of the missing witness is material because it goes directly to Mr. Doe's guilt. The missing witness would provide exculpatory testimony to the effect that Mr. Doe did not hit the complaining witness, testimony directly contradicting the assertions made by the government. Such evidence would have a "reasonable probability" of affecting the outcome of the case. *See Miller*, 14 A.3d at 1115. Without this testimony, the trier-of-fact would have to rely solely on the testimony of the arresting officers. The missing witness's testimony could come into question what the officers saw seeing as the missing witness was at the scene of the arrest prior to the officers' arrival and had a closer vantage point. The trier-of-fact could reasonably conclude that the witness's testimony creates a reasonable doubt as to Mr. Doe's guilt.

[1] "The reasonable probability standard does *not* require a showing that it is more likely than not the defendant would have been acquitted." *Vaughn*, 93 A.3d at 1262 (citing *Kyles v. Whitley*, 514 U.S. 416, 434 (1995)).

B. At Maximum, *Brady* required the Officers to Ascertain the Identifying Information of the Missing Witness.

1. *The Rule of* Brady *is Imputed on the MPD Officers.*

It is irrelevant if the evidence was not known directly by the prosecutor. *See Kyles*, 513 U.S. at 438. It is sufficient for the material, exculpatory evidence to be known or in the possession of only the local police. *See id.* The Supreme Court addressed this exact problem in *Kyles*. The majority in *Kyles* rejected the state of Louisiana's argument that there could not have been a *Brady* violation if the exculpatory evidence was only known by the police and not the prosecutor:

> Since, then, the prosecutor has the means to discharge the government's Brady responsibility if he will, any argument for excusing a prosecutor from disclosing what he does not happen to know about boils down to a plea to substitute the police for the prosecutor, and even for the courts themselves, as the final arbiters of the government's obligation to ensure fair trials.

Id. "[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police." *Id.*; *accord Strickler v. Greene*, 537 U.S. 263, 275 n.12, 280–81 (1999). *Brady* does not tolerate the "government['s] failure to turn over an easily turned rock." *United States v. Brooks*, 966 F.2d 1500, 1503 (D.C. Cir. 1992). "[T]here is no doubt that police investigators sometimes fail to inform the prosecution of all they know, but neither is there a doubt that 'procedures and regulations can be established to carry the prosecutor's burden and to insure communication of all relevant information on each case to every lawyer who deals with it.'" *Farley v. United States*, 694 A.2d 887, 889 (D.C. 1997) (quoting *Kyles*, 514 U.S. at 438.); *see id.* at 890 ("[P]ursuant to *Kyles*, the government is responsible for knowing what the police know[.]").

The issue of officers hiding *Brady* material from prosecutors is not one of first impression in the District of Columbia. In fact, the D.C. Circuit recognized this *Brady* violation before the

Supreme Court's holding in *Kyles*. In *United States v. Brooks*, persuasive but not binding authority for this Court, the federal appellate court recognized that the prosecutors at the U.S. Attorney's Office for the District of Columbia are responsible for disclosing information known by MPD "[g]iven the close working relationship between [MPD] and the U.S. Attorney['s Office]" and the fact that the prosecutors are "closely aligned" with MPD. 966 F.2d 1500, 1503 (D.C. Cir. 1992); *see United States v. Beers*, 189 F.3d 1297, 1304 (10th Cir. 1999) ("Information possessed by other branches of the federal government, including investigating officers, is typically imputed to the prosecutors of the case" for *Brady* purposes).

In this instance, whatever the responding MPD officers knew, they had to inform the prosecutor of such information. The prosecutor cannot claim ignorance because she was not informed of the missing witness who was at the scene of the arrest. *See Kyles*, 513 U.S. at 438. The errors of the MPD officers, such as those of Officers Jones and Miller, is imputed on the prosecution.

2. *The Officers Had a Duty to Obtain and Provide to Mr. Doe the Identifying Information of the Missing Witness.*

Officers in the District Columbia, as part of their *Brady* obligations, have a responsibility to provide the defendant with exculpatory information in their possession. *See supra* Part I.B.1. As part of this duty, the officers have to minimally gather additional information, upon becoming aware of exculpatory evidence, for the evidence to be meaningfully conveyed to the defendant. In this instant, when Officer Jones interviewed the missing witness about what happened between Mr. Doe and the complaining witness, he learned that the missing witness possessed information that contradicted the observations of the arresting officers. He became aware of the fact that the missing witnesses possessed exculpatory information. Officer Jones had a duty to minimally ask for the witnesses' identifying information or have her write a witness statement.

In *Farley*, the government did not provide the defense with the statements of a third-party witness and the witness's police complaint. *See* 694 A.2d at 887–89. The police, while searching for the defendant in connection with a drug offense, broke into the witness's apartment. *See id.* The witness told police officers that he did not see or hear the defendant running into his apartment and that the jacket on the witness's sofa was not that of the defendants. *See id.* at 888. The witness also filed a complaint with the Civilian Complaint Review Board regarding the police mistreatment he faced after they entered his apartment. *See id.* The witness testified to his experiences at the hearing and also testified to the fact that the officers had brought a jacket into his apartment from the outside "in direct contradiction of the police's testimony that they found the jacket on the sofa." *Id.* The defendant challenged his conviction under *Brady* because he was neither provided the witness's testimony nor was the witness available at trial. *See id.* at 889. The Court of Appeals ultimately remanded the case so the lower court could have a hearing on the *Brady* issue. *Id.* at 888. The court made note that the several statements given by the witness to the police were not documented in any record of the police officers' communications with the witness. *See id.* In addition, the Court was troubled by the fact that the witness was not at the trial given the witness's importance for both the government and the defense. *See id.* at 889 n.9.

In *Vaugh*, the D.C. Court of Appeals reversed, in part, the defendant's conviction because the government violated *Brady* when it failed to provide the defense the final report of the Office of Internal Affairs ("OIA") for a correctional officer who served as a government witness. *See* 93 A.3d at 1243, 1258. The report concluded that the government witness reported that another inmate committed the alleged assault, rather than the defendant, in order to justify using a chemical agent on the inmate. *See id.* at 1243. After the OIA viewed the footage showing another inmate committing the assault, the government witness was demoted. *See id.* at 1243–44. The Court

concluded that there should have been systems in place for the government to be aware of the impeaching information. *See id.* at 1258. Similarly, in *United States v. Thomas*, the court ordered a new trial after the government failed to disclose that the government's sole identification witness gave the detective descriptions of the alleged perpetrators that were inconsistent with the physical features of the defendants. *See* 981 F. Supp. 2d 229, 238–39 (S.D.N.Y. 2013); *see also Curry*, 658 A.2d at 197 (finding a *Brady* violation after the government failed to disclose the fact that an eyewitness, on the night of the charged murder, gave a description of a shooter that did not match the defendant).

The lesson that can be gleaned from *Farley*, *Vaughn*, *Thomas*, and *Curry* is this: failure of government agents, who are part of the investigatory team, to obtain and inform the prosecutor of exculpatory evidence, which is then to be provided to the defendant, is a *Brady* violation. In this case, the government had a duty to identify the witness who reported to the officers that Mr. Doe did not hit the complaining witness. Similar to *Curry*, where the police failed to identify an eyewitness to a shooting with exculpatory observations who then moved, the MPD officers who were at the scene of Mr. Doe's arrest failed to ask for the missing witness's identification information even though she possessed exculpatory information. *See id.* Despite the witness telling the officers that Mr. Doe did not hit the complaining witness, MPD failed to make any effort to have the witness identify herself or give a witness statement. *See* Jones BWC at 5:44-52. When Officer Jones was asking the witness, at length, about what happened, at no point did he ask the witness for her name, address, or phone number. Instead, rather than encourage or solicit a witness statement or identifying information, Officer Miller actively *discouraged* the missing witness from filling out a witness statement. *See* Miller BWC at 6:00–02.

Apparently, the MPD officers justified this decision in two ways: the complaining witness did not know the witness and the officers did not find the witness credible. As to the first justification, the MPD officers' responsibility to obtain the identification information was heightened because the complaining witness and Mr. Doe did not know who the witness was. *Cf. Zanders*, 999 Aa.2d at 164; *Lindsey v. United States*, 911 A.2d 824, 839 (D.C. 2006) (quoting *Curry*, 658 A.2d at 197) (disclosure of witness information must be made "at such a time as to allow the defense to use the favorable material effectively in the preparation and presentation of its case"). As to the second justification, Officer Jones thought the witness would have given "false statements." This determination, however, is beyond the purview of the officer's responsibility. The officer is tasked with investigating and obtaining all the potentially relevant information regarding an alleged crime. They are not tasked with making credibility determinations for witnesses. That is the sole duty of a trier-of-fact at trial after a direct and cross-examination. *See Sykes v. United States*, 897 A.2d 769, 779–80 (D.C. 2006) (failure of the witnesses' presence at trial to testify deprived the jury of "an opportunity . . . to observe their demeanor and to make a credibility determination").

3. *This Case is Distinguishable from Cases in Which the Government Was Not in Possession of Material Information.*

It is important to not conflate the issue in this case with other *Brady* issues addressed by the D.C. Court of Appeals that involved the absence of material information as was observed in *Reyes v. United States* and its line of cases. *See* 933 A.2d 785, 793–94 (D.C. 2007) (finding no *Brady* violation because the government was not in possession of material information). *Reyes* is distinguishable to the one at bar in significant ways. Firstly, the police in *Reyes* obtained no "material evidence" because the witness said that "he did not recall seeing" the complaining witness at the night of the incident – justifying why the police did not "further interview" and

pursue the lead. *See id.* at 794. In the case of Mr. Doe, the missing witness provided a detailed account of what happened prior to the police arriving which was at a closer vantage point than the arresting officers. *See* Jones BWC at 5:23–52. *Reyes* instructs that there can be no *Brady* violation when there is an absence of information seeing as the witness in *Reyes* did not recall seeing the incident in question. *See* 933 A.2d at 794. Here, however, because the officers in Mr. Doe's case took the steps to obtain a detailed account of what happened from the missing witness, rather than receiving no material information from the missing witness, as was the case in *Reyes*, the officers had a duty to ask the additional one or two questions to obtain her identity. *Cf. Kyles*, 514 U.S. at 437–38. Secondly, the witness information involved in *Reyes* would have merely been used for the purpose of impeachment. *See Reyes*, 933 A.2d at 794 (finding no *Brady* violation when the police failed to identify a witness who would have impeached the testimony of the complaining witness). In this case, however, the complaining witness would have provided direct, exculpatory evidence negating Mr. Doe's guilt. For these reasons, *Reyes* is inapplicable to this case.

Mr. Doe's case is also distinguishable from other cases in which the defendant sought information that did not exist. *See Velasquez v. United States*, 801 A.2d 72, 81 (D.C. 2002) (finding no *Brady* violation after the government sought and did not find a witness's mental health treatment records); *Guest v. United States*, 867 A.2d 208, 211 (D.C. 2005) (finding no *Brady* violation after the government abided by a court order to do a records check on a witness and the government reported that it could not find any records for a witness). Both *Velasquez* and *Guest* involved the complete absence of information. This is not the case at bar. The missing witness was in front of Officer Jones and he asked a number of questions about what happened, and she provided a detailed response. *See* Jones BWC at 5:07–52. Officer Jones

already solicited and received material, exculpatory information. Due to his actions and receipt of information, Officer Jones then had a duty to ask for her identity to ensure that Mr. Doe was not hamstrung when he received the BWC footage of the missing witness's eyewitness account. The exculpatory evidence is only useful insofar as Mr. Doe can find and subpoena the missing witness. If it is the case that the police can ask questions of a witness with exculpatory information as part of their investigation and then circumvent *Brady* by failing to even ask the witness his or her name, with the hope the witness can become unreachable, then *Brady* would be a hollow protection for a defendant's due process.

C. At a Minimum, the Government Committed a *Brady* Violation for Failing to Disclose the Existence of the Missing Witness in a Timely Manner.

The rule of *Brady*, as the D.C. Court of Appeals has held, requires "disclosure of exculpatory information . . . 'at the earliest feasible opportunity' and 'as soon as practicable following the filing of charges.'" *Miller*, 14 A.3d at 1108 (quoting American Bar Association, Standards for Criminal Justice, The Prosecution Function, §§ 11–2.1(c) & 11–2.2(a) (2d ed. 1980)). "A prosecutor's timely disclosure obligation with respect to *Brady* material can never be overemphasized, and the practice of delayed production must be disapproved and discouraged." *Id.* (quoting *Boyd v. United States*, 908 A.2d 39, 57 (D.C. 2006)). *Brady* requires a timely disclosure because, in order to receive due process, the defense needs "to have a fair opportunity to pursue leads before they turn cold or potential witnesses become disinclined to cooperate with the defense." *Zanders*, 999 A.2d at 164.

To reiterate, the government was in possession of BWC footage that showed the missing witness telling Officer Jones that "[Mr. Doe] never hit [the complaining witness] because I was standing [at the scene] the whole time," which is material, exculpatory information. *See* Jones BWC at 5:49–52. The video was produced and preserved on August 17, the day Mr. Doe was

arrested and charged. This information was never provided to Mr. Doe until the government dumped hours of body camera footage on October 16, 2019. The government's disclosure of the existence of a *Brady* witness who possessed exculpatory evidence and the contents of her eyewitness testimony should have been provided, *at the very least*, to Mr. Doe on September 30, the day Mr. Doe requested *Brady* material in his *Rosser* letter. *See* Notice of Filing at 9. This provided the government with *forty-four days* to disclose the missing witness's existence since the day Mr. Doe was charged. The government, however, executed its delaying tactic by hiding the evidence in hours of footage about two months after Mr. Doe's arrest. Because her location is unknown to Mr. Doe, he will be significantly prejudiced by not being able to call the missing witness to the stand in order to question her on direct and have her provide critical, exculpatory evidence that would have negated Mr. Doe's guilt.

Applicant Details

First Name	**Cameron**
Last Name	**Hinojos**
Citizenship Status	**U. S. Citizen**
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Applicant Education

BA/BS From	**Texas Tech University**
Date of BA/BS	**May 2016**
JD/LLB From	**The University of Michigan Law School** **http://www.law.umich.edu/currentstudents/careerservices**
Date of JD/LLB	**May 6, 2022**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Michigan Journal of Environmental and Administrative Law**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Campbell Moot Court Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**Yes**

Specialized Work Experience

Specialized Work Experience	**Appellate**

Recommenders

Sankaran, Vivek
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This applicant has certified that all data entered in this profile and any application documents are true and correct.

Cameron Hinojos

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April 10, 2022

The Honorable Elizabeth W. Hanes
U.S. District Court for the Eastern District of Virginia
Spottswood W. Robinson III & Robert R. Merhige, Jr., U.S. Courthouse
701 East Broad Street
Richmond, VA 23219

Dear Judge Hanes:

I am a third-year law student at the University of Michigan Law School writing to apply for a clerkship in your chambers for the term starting in August 2022. In law school, I developed research, writing, and analysis skills that I believe will make me a valuable contributor to your chambers.

In my second year of law school, I joined the Child Welfare Appellate Clinic, where I wrote a brief for the Michigan Court of Appeals challenging the termination of my client's parental rights. In the clinic, I learned about researching unfamiliar areas of law, writing compelling narratives, and creating persuasive arguments. Recently, I further improved those skills when I wrote a brief and argued before numerous panels in the Campbell Moot Court Competition. Several judges gave my brief and oral arguments exceptional scores. Additionally, I have taken several courses, including Federal Courts, that have increased my understanding of subjects relevant to your chambers.

Last summer and in the spring semester, I interned with the U.S. Securities and Exchange Commission in the Division of Enforcement, where I worked on many legal writing assignments. One assignment asked me to determine whether a new SEC regulation infringed on the right to free speech. I researched First Amendment protection of commercial speech and drafted a memorandum concluding that, under the current test for unconstitutional infringement of commercial speech, the regulation would withstand a constitutional challenge. For other assignments, I researched privilege and other discovery issues. These assignments taught me about deliberative privilege, government attorney work-product doctrine, attorney-client privilege, and appropriate scope of discovery.

Please find attached my resume, law school transcript, and writing sample for your review. I have also provided three letters of recommendation from the following individuals:

- Steven Cernak (Lecturer, Michigan Law): sjcernak@umich.edu, (734) 647-4467
- Vivek Sankaran (Clinical Professor of Law, Michigan Law): vss@umich.edu, (734) 936-9706
- David Stoelting (Senior Trial Counsel, SEC): stoeltingd@sec.gov, (212) 336-0174

Thank you for your time and consideration.

Respectfully,

Cameron Hinojos

Cameron Hinojos

1055 Hasper Drive, Ann Arbor, MI 48103 – (915) 345-8115 – camhinoj@umich.edu

EDUCATION

UNIVERSITY OF MICHIGAN LAW SCHOOL Ann Arbor, MI
Juris Doctor May 2022
Honors: Dean's Scholarship
Journal: Michigan Journal of Environmental & Administrative Law, Junior Editor
Activities: Latinx Law Students Association, Juan Luis Tienda Banquet Committee Co-Chair
Campbell Moot Court Competition, Participant

TEXAS TECH UNIVERSITY Lubbock, TX
Bachelor of Science in Chemical Engineering May 2016

EXPERIENCE

U.S. SECURITIES AND EXCHANGE COMMISSION Washington, DC
Student Honors Program Intern January 2022 – Present

- Drafted triage memorandum, presented findings to the review committee, and successfully argued for opening an investigation
- Researched and drafted memoranda on (1) whether certain topics were protected by privilege and (2) whether an individual was subject to control person liability for violation of net capital requirements

U.S. SECURITIES AND EXCHANGE COMMISSION New York, NY
Student Honors Program Intern May 2021 – August 2021

- Researched and drafted memoranda on whether (1) an agency rule violates the First or Fifth Amendments and (2) whether certain agency documents are privileged or relevant for discovery
- Researched and summarized cases on when the statute of limitations clock starts under Section 17(a) of the Securities Act of 1933 for securities offering violations
- Conducted document review to determine whether individuals made false statements to investors

CHILD WELFARE APPELLATE CLINIC, UNIVERSITY OF MICHIGAN LAW SCHOOL Ann Arbor, MI
Student Attorney August 2020 – December 2020

- Researched and drafted a brief for the Michigan Court of Appeals arguing that the appellant-mother's conduct did not establish statutory grounds for termination of her parental rights

JUVENILE JUSTICE CLINIC, UNIVERSITY OF MICHIGAN LAW SCHOOL Ann Arbor, MI
Student Attorney May 2020 – August 2020

- Defended a client in a restitution hearing and secured relief on the grounds that the prosecution was seeking unreasonably high restitution and that certain expenses were unrecoverable
- Co-drafted an amicus curiae brief for the Michigan Supreme Court arguing that criminal law governs the timeline for a juvenile appeal

BORGER INDEPENDENT SCHOOL DISTRICT Borger, TX
High School Geometry and Algebra Teacher August 2017 – May 2019

ADDITIONAL

Volunteer: LAW Breaks, volunteer tax advisor at United Community Housing Coalition
Interests: Sketching animals with charcoal and graphite pencils, walking my dogs, eating breakfast foods

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The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Hinojos,Cameron Anthony
Student#: 92291897

University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Fall 2019	**(September 03, 2019 To December 20, 2019)**							
LAW	510	002	Civil Procedure	Richard Friedman	4.00	4.00	4.00	B
LAW	520	002	Contracts	Bruce Frier	4.00	4.00	4.00	A-
LAW	580	002	Torts	Don Herzog	4.00	4.00	4.00	C
LAW	593	008	Legal Practice Skills I	Nancy Vettorello	2.00		2.00	S
LAW	598	008	Legal Pract:Writing & Analysis	Nancy Vettorello	1.00		1.00	S
Term Total				**GPA: 2.900**	**15.00**	**12.00**	**15.00**	
Cumulative Total				**GPA: 2.900**		**12.00**	**15.00**	
Winter 2020	**(January 15, 2020 To May 07, 2020)**							
During this term, a global pandemic required significant changes to course delivery. All courses used mandatory Pass/Fail grading. Consequently, honors were not awarded for 1L Legal Practice.								
LAW	530	001	Criminal Law	David Moran	4.00		4.00	PS
LAW	540	003	Introduction to Constitutional Law	Leah Litman	4.00		4.00	PS
LAW	594	008	Legal Practice Skills II	Nancy Vettorello	2.00		2.00	PS
LAW	671	001	Climate Change and the Law	David Uhlmann	3.00		3.00	PS
Term Total					**13.00**		**13.00**	
Cumulative Total				**GPA: 2.900**		**12.00**	**28.00**	

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The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Hinojos,Cameron Anthony
Student#: 92291897

University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Fall 2020	**(August 31, 2020 To December 14, 2020)**							
LAW	675	001	Federal Antitrust	Daniel Crane	3.00	3.00	3.00	B+
LAW	723	001	Corporate Lawyer: Law & Ethics	Vikramaditya Khanna	4.00	4.00	4.00	B+
LAW	756	001	Comparative Human Rights Law	John Christopher McCrudden	3.00	3.00	3.00	B+
LAW	929	001	Child Welfare Appellate Clinic	Vivek Sankaran Timothy Pinto	5.00	5.00	5.00	A-
Term Total				**GPA: 3.433**	**15.00**	**15.00**	**15.00**	
Cumulative Total				**GPA: 3.196**		**27.00**	**43.00**	
Winter 2021	**(January 19, 2021 To May 06, 2021)**							
LAW	486	001	Couns & Advocacy in Antitrust	Steven Cernak	2.00	2.00	2.00	A-
LAW	669	001	Evidence	Eve Primus	4.00		4.00	P
LAW	716	001	Complex Litigation	Maureen Carroll	4.00	4.00	4.00	B+
LAW	743	001	Securities Regulation	Adam Pritchard	4.00	4.00	4.00	B
Term Total				**GPA: 3.260**	**14.00**	**10.00**	**14.00**	
Cumulative Total				**GPA: 3.213**		**37.00**	**57.00**	

Continued next page >

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The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Hinojos,Cameron Anthony
Student#: 92291897

University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Fall 2021	**(August 30, 2021 To December 17, 2021)**							
LAW	575	001	Natural Resources Law	Andrew Mergen Seth Barsky	2.00	2.00	2.00	B+
LAW	601	001	Administrative Law	Nina Mendelson	4.00	4.00	4.00	A-
LAW	637	001	Bankruptcy	John Pottow	4.00	4.00	4.00	B+
LAW	679	001	Environmental Law and Policy	Andrew Buchsbaum	3.00			I
LAW	685	001	Design Fulfilling Life in Law	Bridgette Carr Vivek Sankaran	2.00		2.00	S
Term Total				**GPA: 3.460**	**15.00**	**10.00**	**12.00**	
Cumulative Total				**GPA: 3.265**		**47.00**	**69.00**	
Winter 2022	**(January 12, 2022 To May 05, 2022)**							
Elections as of:	03/09/2022							
LAW	677	001	Federal Courts	Daniel Deacon	4.00			
LAW	750	001	Corporate Reorganization	Phillip Shefferly	2.00			
LAW	941	801	Full-Time Externship Seminar	Amy Sankaran	1.00			
LAW	990	004	Part-Time Externship	Amy Sankaran	5.00			

End of Transcript
Total Number of Pages 3

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University of Michigan Law School
Grading System

Honor Points or Definitions

Through Winter Term 1993		Beginning Summer Term 1993	
A+	4.5	A+	4.3
A	4.0	A	4.0
B+	3.5	A-	3.7
B	3.0	B+	3.3
C+	2.5	B	3.0
C	2.0	B-	2.7
D+	1.5	C+	2.3
D	1.0	C	2.0
E	0	C-	1.7
		D+	1.3
		D	1.0
		E	0

Other Grades:

F Fail.

H Top 15% of students in the Legal Practice courses for students who matriculated from Spring/Summer 1996 through Fall 2003. Top 20% of students in the Legal Practice courses for students who matriculated in Spring/Summer 2004 and thereafter. For students who matriculated from Spring/Summer 2005 through Fall 2015, "H" is not an option for LAW 592 Legal Practice Skills.

I Incomplete.

P Pass when student has elected the limited grade option.*

PS Pass.

S Pass when course is required to be graded on a limited grade basis or, beginning Summer 1993, when a student chooses to take a non-law course on a limited grade basis.* For SJD students who matriculated in Fall 2016 and thereafter, "S" represents satisfactory progress in the SJD program. (Grades not assigned for LAW 970 SJD Research prior to Fall 2016.)

T Mandatory pass when student is transferring to U of M Law School.

W Withdrew from course.

Y Final grade has not been assigned.

* A student who earns a grade equivalent to C or better is given a P or S, except that in clinical courses beginning in the Fall Term 1993 a student must earn a grade equivalent to a C+ or better to be given the S.

MACL Program: HP (High Pass), PS (Pass), LP (Low Pass), F (Fail)

Non-Law Courses: Grades for these courses are not factored into the grade point average of law students. Most programs have customary grades such as A, A-, B+, etc. The School of Business Administration, however, uses the following guides: EX (Excellent), GD (Good), PS (Pass), LP (Low Pass) and F (Fail).

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The work reported on the reverse side of this transcript reflects work undertaken for credit as a University of Michigan law student. If the student attended other schools or colleges at the University of Michigan, a separate transcript may be requested from the University of Michigan, Office of the Registrar, Ann Arbor, Michigan 48109-1382.

Any questions concerning this transcript should be addressed to:

Office of Student Records
University of Michigan Law School
625 South State Street
Ann Arbor, Michigan 48109-1215
(734) 763-6499

April 10, 2022

Vivek S. Sankaran
Clinical Professor of Law
University of Michigan Law School

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am writing to strongly recommend Cameron Hinojos for a clerkship in your chambers. Cameron is incredibly bright, works hard and is a pleasure to work with. I have no doubt he'll succeed as a clerk.

Cameron was a student in the Child Welfare Appellate Clinic, which I direct, in the Fall of 2020. The clinic provides pro bono appellate representation to individuals whose parental rights have been terminated. In addition to zealously advocating for our clients, the clinic seeks to shape child-welfare law in Michigan to ensure the grave decision to terminate parental rights is not made lightly.

Cameron was assigned to represent a mother with serious cognitive limitations whose rights had been terminated. His case presented important questions on when the rights of parents with disabilities should be terminated, especially when children are living safely in the care of family.

I worked with Cameron and his clinic partner closely as he reviewed a lengthy record, identified issues and drafted the client's brief. He is a strong writer and creative legal thinker. He developed a novel and compelling argument based on Michigan statutes and the Constitution. Although we didn't prevail, I have no doubt that his advocacy helped develop child welfare law jurisprudence in Michigan.

Cameron was in all respects a strong student. He participated actively in class discussions, provided thoughtful feedback on other students' briefs, and consistently demonstrated a commitment to growing as a writer and legal thinker. I believe he would be an excellent addition to your chambers.

Regards,

Vivek Sankaran
Clinical Professor of Law
University of Michigan Law School

University of Michigan Law School
625 S. State Street
Ann Arbor, MI 48109

Steven Cernak
Adjunct Professor of Law
sjcernak@umich.edu

April 10, 2022

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I write to enthusiastically recommend Cameron Hinojos for any clerkship position for which he applies. I enjoyed having such a bright student in my Counseling and Advocacy in Antitrust class and I am confident that you will enjoy having him work in your chambers.

I have been an adjunct professor teaching various antitrust classes at Michigan Law School since 2009 and Western Michigan Cooley Law School since 2010. I also taught at Wayne State in 2013-15. Several of my former students went on to various clerkships and many are now antitrust practitioners around the globe. I am the author of two books and hundreds of shorter articles and speeches on various antitrust topics.

In my class at Michigan, I use one of my books to teach several key antitrust topics (for example, conspiracy, monopolization, and merger review) and then help the students apply their learning in real world simulations. For instance, Cameron participated in a mock oral argument in a Sherman Act Section 1 conspiracy case and a mock meeting with a Justice Department attorney in a merger review.

Because my class is open to all students after first semester first year students, I sometimes get students who have difficulty quickly grasping some of the more difficult antitrust concepts. That was not a problem with Cameron. He very quickly picked up on some of the more difficult topics and turned them into effective arguments. For instance, he and another student/partner developed and made innovative and effective arguments for a merger of two companies that, depending on market definition, were each other's closest competitors.

All my students write a final "memo" explaining the law of loyalty pricing and monopolization to the general counsel of a large company. The memo also must offer some practical advice regarding the company's current pricing practices. The assignment can be difficult for students because there is no single Supreme Court test for evaluating the antitrust effects of such pricing. Cameron successfully integrated the teaching we have from various appellate courts with the facts of the case to write a memo providing clear and actionable advice.

In his oral argument, Cameron obviously understood the key legal issues of the Sherman Act Section 1 conspiracy. His engineering background came through in his attention to detail. He developed and articulated an excellent argument for his "client." He got better as the argument went on and eventually engaged in a helpful back-and-forth with the professor/judge. I think his teaching background kicked in and he gained the confidence to boldly interact live on difficult legal issues.

Also, Cameron seems like a fun guy to have around. Down-to-earth, confident but not full of himself, he will fit in nicely in any chambers, law firm, or governmental agency. You will enjoy having him working for you.

I am happy to answer further questions about my experience with Cameron Hinojos. I can be reached at any of the addresses listed below.

Sincerely,

Steven J. Cernak
Partner, Bona Law PC
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NEW YORK, NY 10281-1022

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August 6, 2021

Letter of Recommendation for Cameron Hinojos

Dear Judge:

It is with great pleasure that I submit this letter of recommendation in support of Cameron Hinojos's application for a judicial clerkship.

For the last seventeen years, I have been a Senior Trial Counsel with the Securities and Exchange Commission (SEC) in New York City. My duties include litigating and trying cases in federal court and administrative tribunals involving violations of the federal securities laws. Prior to joining the SEC I was in private practice in New York City for twelve years.

Each summer, the SEC recruits law student interns to work full-time. The process is highly selective and for a number of years I have supervised many of the interns. In the summer of 2021, I supervised and worked closely with Cameron Hinojos throughout his time here. Without question, Cameron was one of the most impressive summer intern that I have ever worked with.

For about twelve weeks, Cameron assisted me with my busy caseload. We were in contact on a daily basis throughout the summer on the numerous short and long-term assignments crossing my desk. Cameron performed at a very high level.

Cameron's assignments for me included preparing investigative subpoenas; legal research on a broad variety of issues; researching a public database and

compiling a detailed record of a person under investigation; and assisting with the drafting of various brief and motion papers. I called on Cameron to perform legal research on many varied and complex topics relating to federal court discovery and the securities laws. Cameron always completed assignments on time and surpassed expectations.

Cameron had a great enthusiasm for work and a tremendous ability to juggle many difficult assignments. Cameron also worked easily with other SEC colleagues and team members, and he attended team meetings and strategy sessions. Without exception, everyone came away impressed with Cameron as a person and as a professional in a high pressure environment.

I expect that many of the applicants for judicial clerkships are very bright, and of course Cameron is exceptionally smart. Cameron has extra qualities of persistence, determination and dedication that truly distinguish him. Cameron displayed a mature judgment about the law and legal issues.

In conclusion, I give Cameron Hinojos my very highest recommendation. Please do not hesitate to contact me if I can be of any further assistance.

Very truly yours,

/s/ *David Stoelting*
David Stoelting
(212) 336-0174
stoeltingd@sec.gov

Cameron Hinojos

1055 Hasper Drive, Ann Arbor, MI 48103 – (915) 345-8115 – camhinoj@umich.edu

Writing Sample

I wrote this memorandum for my Counseling and Advocacy in Antitrust practice simulation during my second year in the Winter 2021 Semester. My professor suggested that we use a couple of relevant cases from our course materials, but I did find and cite other cases and secondary sources that we did not cover in class. This memorandum is completely self-edited.

Memorandum

To: Jack Jacobson
From: Cameron Hinojos
Re: Antitrust Risks of the Anniston Advantage Loyalty Discount Program and Recommendations
Date: April 23, 2021

Summary

You asked me to determine if the Anniston Advantage Program creates any legal risks for Anniston Transmissions under federal antitrust law. It is unlikely that the program violates the antitrust laws, but there is a small chance that it does. Because antitrust violations carry treble damages, the program poses a risk to Anniston. The program raises issues under Section 2 of the Sherman Act, which prohibits monopolization by a monopolist. Here, Anniston is likely a monopolist due to its considerable market share and the direct evidence of price control. The Anniston Advantage Program might be an unlawful act of monopolization under two different recognized theories: (1) it might substantially foreclose the market or (2) it might cause Anniston to price the transmissions below its manufacturing costs to apply the discounts. The legal risks are high enough that I recommend some modifications.

Facts

These are the facts as I understand them, but I also have some questions for you because the record is unclear or missing important information needed for an accurate assessment of the risk. I will ask those questions as they come up.

Anniston supplies 80% of all automatic transmissions for medium- and heavy-duty trucks. The two main vocations for these trucks are line-haul shipping and stop-and-go operations, e.g., buses and garbage trucks. Almost all line-haul trucks are equipped with manual transmissions, whereas stop-

and-go trucks exclusively use automatic transmissions. Manual transmissions are much cheaper than automatic transmissions.

Recently, Anniston and its largest competitor ZX attempted a merger, but the Department of Justice objected and characterized Anniston as a "monopolist in the market of automatic transmissions for 'stop-and-go' vocations." Due to that challenge, the merger was abandoned. After the failed merger, the Anniston sales department created a loyalty deal called the Anniston Advantage Program. The program would give truck manufacturers a 20% discount on every Anniston transmission they purchase for the next twelve months. To qualify, the manufacturers must commit to selling automatic transmissions in 50% of their trucks for every vocation they manufacture, and 90% of those automatic transmissions must be Anniston transmissions. The program excluded military vehicles and replacement parts from the deal.

The sales department stated that the motivation for the program was to cut ZX off from the market and to "keep them where they are at." The department also noted that one of Anniston's biggest buyers Freeleaner might feel forced to take the deal despite the losses Freeleaner will incur from compliance with the terms. The department believed that all of Anniston's customers would be forced to take the deal to stay competitive. It also stated that a clawback provision for not meeting the requirements each month would be necessary. Anniston's finance department stated that the program will be profitable only if the take rate is high enough and only if enough military vehicles and parts are sold at regular price.

Freeleaner's and ZX's general counsels independently raised concerns with the program. Freeleaner stated that it believes the program violates federal antitrust laws and it is prepared to file a lawsuit if

the deal is not rescinded or modified. Freeleaner manufactures trucks in both the line-haul and stop-and-go market. Freeleaner believes it will be forced to accept the program to stay competitive in the stop-and-go market but that the deal would harm it in the line-haul market because its line-haul customers do not want the higher priced automatic transmissions. To keep these customers, Freeleaner will have to outfit more line-haul trucks with automatic transmissions and sell them at a loss. Both Freeleaner and ZX indicated that this program would foreclose enough of the automatic transmission market that ZX would suffer and possibly exit the market entirely. Finally, ZX and Freeleaner believe that Anniston will be selling the transmissions below the costs of production under the deal. They base their beliefs on information gathered from a recent supplier audit and the due diligence done in preparation for the merger.

Discussion

Anniston faces a low to moderate risk of violating the antitrust laws by implementing its Anniston Advantage Program. For Anniston to face a legal risk under Sherman Act Section 2, it will need to (1) possess monopoly power and (2) have willfully acquired or maintained monopoly power through means other than competition on the merits. *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966). Monopoly power is the power to control prices or exclude competitors from the market. *Id.* For the second element, sometimes called monopolization, courts have developed a non-exhaustive list of conducts that could amount to monopolization and apply different tests to each conduct.

Loyalty discount programs are one of the schemes that can amount to monopolization. Loyalty discounts are typically treated as a possible predatory pricing scheme. *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 275 (3d Cir. 2012). To monopolize by predatory pricing a monopolist must price its product below its cost of production and have a dangerous probability of recouping its losses after driving its competitors out of the market. *Brooke Group Ltd. v. Brown & Williamson*

Tobacco Co., 509 U.S. 209, 224 (1993). This is known as the price-cost test and creates a very high bar for a successful claim. Alternatively, some courts categorize certain loyalty discount programs as de facto exclusive dealing contracts. *ZF Meritor*, 696 F.3d at 277. To monopolize with exclusive dealing contracts, a monopolist must foreclose a significant part of the market and the probable effect of that foreclosure is to substantially impede competition. *Id.* at 271. This is known as the substantial foreclosure test. The monopolist would need to lose on the price-cost test or the substantial foreclosure test to be liable.

Here, Anniston is very likely a monopolist due to its 80% share of the automatic transmission market and due to the direct evidence of its ability to control prices. The deal might qualify as an exclusive dealing offense, but Anniston is unlikely to be monopolizing by exclusive dealing or predatory pricing. If the deal is analyzed using the substantial foreclosure test for exclusive dealings, there is a low risk of liability. But there are some modifications Anniston can make to the plan to remove almost any possibility of impermissible foreclosure. On the other hand, if it is analyzed using the price-cost test for predatory pricing, the Anniston Advantage Program is most likely legal because there is no reliable evidence that Anniston will price its transmissions below the appropriate measure of the costs of production under the deal. I highly recommend that Anniston make some changes to the program to avoid any trebled antitrust damages, even if the probability of losing a lawsuit is low.

I. Anniston has monopoly power

Anniston is almost certainly a monopolist in the medium- and heavy-duty automatic transmission market. A monopolist is one who has the power to control prices unilaterally or to exclude competitors. *Grinnell*, 384 U.S. at 570. If a business has a large enough market share, it is presumed to be a monopolist. *U.S. v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 391 (1965) (stating that 75%

share would constitute a monopoly). Defining a market requires finding the cross-elasticity of demand for a product, which is typically found using the hypothetical monopolist test. *U.S v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 393 (1956); U.S. Dep't of Justice and FTC, Horizantal Merger Guidelines § 4 (2010).

Direct evidence of price control can establish monopoly power without the need to determine market share. But if there is no direct evidence, defining the market and its participants requires using advanced econometric analysis to establish how easily consumers can switch to the closest substitute product. *duPont*, 351 U.S. at 393. Here, there is enough evidence to establish Anniston's monopoly power in the medium- and heavy-duty truck automatic transmission market. First, Anniston is ready to cut prices by 20%, a large discount, indicating that Anniston can change its prices at will. Anniston also plans on excluding certain sales from the deal, further evidence that it has unilateral control of its prices. Second, the DOJ, which uses the hypothetical monopolist test when defining markets, defined the relevant market as automatic transmissions in certain vocations. It stated that Anniston was a monopolist of that market. This statement is not dispositive of the issue but is highly persuasive. Therefore, Anniston is most likely a monopolist.

II. There is a small chance that Anniston monopolized

It is unlikely but possible that Anniston is monopolizing for the purposes of Sherman Act Section 2. As previously mentioned, this loyalty discount program might be classified as predatory pricing or de facto exclusive dealing. Making a claim under the price-cost test requires much stronger evidence than under the substantial foreclosure test, and Anniston would prefer that its conduct be judged under the former.

Here, Anniston's conduct is likely exclusive dealing because the deal could be using more coercive mechanisms than lower prices to induce acceptance. Under the substantial foreclosure test, there is a small possibility that Anniston is violating the antitrust laws with exclusive dealings. However, if Anniston is only using lower prices to induce acceptance, there is a very small probability that the conduct fails under the price-cost test.

a. It is more likely than not that Anniston's conduct is de facto exclusive dealing

There is a risk that the Anniston Advantage Program is de facto exclusive dealing. When price is the clearly predominant mechanism of excluding competitors from the market, the price-cost test will apply. *ZF Meritor*, 696 F.3d at 275. Some factors used to determine if price is the predominant mechanism of exclusion are (1) the coercive nature of the deal, (2) the need for buyers to take actions they do not want to take, (3) the existence of clawback or supply cancellation provisions for buyers not meeting the agreed upon targets, and (4) the buyers' freedom to walk away from the discounts at any time. *ZF Meritor*, 696 F.3d at 277-78; *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1063 (8th Cir. 2000).

In *ZF Meritor*, there was evidence that the monopolist used its position as a necessary supplier to force acceptance of its loyalty discount programs and to push their buyers to block the end users' access to the monopolist's competitor's products. *ZF Meritor*, 696 F.3d at 277. The terms of that deal required the monopolist's buyers to stop advertising and marketing competitor products to the end users. *Id.* Additionally, there was evidence that the terms of that agreement were detrimental to the buyers and end users, but the buyers felt forced to accept the terms anyway. *Id.* Finally, the terms of the deal allowed the monopolist to claw back the rebates and cancel the supply contracts entirely for not hitting targets, which would have caused major supply issues for the buyers. *Id.* at

265. In *ZF Meritor*, the monopolist's loyalty discount program was found to be de facto exclusive dealing. *Id.* at 281. However, in *Concord Boat*, the evidence there strongly suggested that the buyers had an opportunity to walk away and that many of them did walk away from the deal. *Concord Boat*, 207 F.3d at 1059. In *Concord Boat*, the court found the deals were not exclusive; therefore, only the price-cost test applied. *Id.* at 1062-63.

Here, the deal does seem coercive to at least one of Anniston's major buyers Freeleaner. Freeleaner stated that it would feel forced to take the deal. It also noted that acceptance of the program would be detrimental to it and its customers and that Freeleaner would not accept the deal unless forced to do so. The detrimental effect of the deal to one of Anniston's buyers and the evidence of coercion indicate that more than lower prices are being used to induce acceptance of the deal. I suggest that Anniston either reduce or eliminate the 50% automatic transmission purchase requirement from the deal to reduce its coercive nature.

There is a note from the sales team stating that the program would require a clawback provision for not hitting target sales each month to remain profitable. Was a clawback provision ever incorporated into the deal? Additionally, do the terms allow Anniston to cancel the supply contracts with the buyers if targets are not hit? Please send me answers to both questions as the answers could be of some major consequence. If neither of those terms were ever adopted, then the third factor weighs against an exclusive dealing contract. But, if one or both of those terms were adopted, the program is far more likely to be an exclusive dealing contract. I strongly recommend that Anniston not include either of those provisions in the deal.

The final factor is whether buyers feel free to buy from the monopolist's competitors and to market competitor products. Here, there is no indication that Anniston has implemented schemes to keep customers from buying ZX products outside of lowering prices. Additionally, the program did not impede Anniston's customers from marketing competitor products to the end users. This factor weighs against finding an exclusive dealing contract. But to avoid a suit from Freeleaner, I would recommend lowering the purchase requirement from 90% to 70%.

b. If the program is a de facto exclusive dealing, it is unlikely that it is in violation of the federal antitrust laws

Anniston is unlikely to have monopolized by substantially foreclosing the market. To win on a claim of monopolizing through exclusive dealing contracts requires proving that (1) enough of the market has been substantially foreclosed, (2) the contracts are of sufficient duration, and (3) the likely anticompetitive harms outweigh procompetitive effects. *ZF Meritor*, 696 F.3d at 271-72; *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327-29 (1961). Some courts will also consider the ability of customers to terminate the agreement. *ZF Meritor*, 696 F.3d at 272. Substantial foreclosure generally requires tying of more than 80% of the market with exclusive dealing contracts. *ZF Meritor*, 696 F.3d at 283; *Concord Boat*, 207 F.3d at 1059. Tying up more than 90% of the market would almost certainly substantially foreclosure the market. *ZF Meritor*, 696 F.3d at 284. But even if a very large share of the market is foreclosed, contracts of one to two years are typically lawful. *Id.* at 286.

Here, there are concerns with the large share of the market foreclosed, the anticompetitive harms, and the inability of customers to freely terminate the agreement. The Anniston sales team believes that all their buyers, who make up the entire buying market, will accept the deal. If all truck manufacturers agree to participate, and they agree to purchase 90% of all automatic transmissions

from Anniston, then 90% of the market will be foreclosed to ZX. This is enough market share to substantially foreclose the automatic transmission market to competitors.

Evidence that the deals are not in the customers' best interests and evidence that shows an intent to block competitors can be strong indicators of anticompetitive harms. *Id.* at 288-89. Freeleaner stated that it feels forced to take the deal and that accepting the deal would harm it financially and reputationally. Additionally, there is evidence from the sales team's presentation that the motivation of the deal was to "keep [ZX] where they are at" and to cut ZX out of the market before it could start marketing again after the failed merger. In contrast, the only recognized procompetitive factor here, while a strong one, is lower prices. But those savings do not apply to Freeleaner since it would lose money on this deal. The harm to Freeleaner and the explicitly documented intent of Anniston to block a competitor from the market could outweigh the procompetitive benefit of lower prices to some of Anniston's customers.

I have already indicated that there is not enough information to determine if the customers feel free to cancel without retaliation, clawback, or supply cancellation. I stress that if any supply cancellation or clawback provisions were adopted that Anniston remove them.

Anniston's program is of a sufficiently short term that it will not trigger any liability. It is not dispositive, but a one-year contract is likely to be presumptively legal or close to it. Therefore, the deal is likely legal, but there is enough of a risk to warrant some changes. As stated above, I recommend lowering the 90% purchase requirement to 70% to avoid any potential liability.

c. It is unlikely that Anniston has monopolized by predatory pricing

Anniston is unlikely to be monopolizing by predatory pricing. To win on a claim for predatory pricing, a plaintiff must show that the monopolist priced its products below its costs of production and that the monopolist can recoup its losses after it has priced its competitors out of the market. *Brooke Group*, 509 U.S. at 224. Nearly all circuits have adopted the average variable cost of production (AVC) as the appropriate measure of cost. Herbert Hovenkamp, Federal Antitrust Policy, the Law of Competition and its Practice 446 (2020).

Here, there is some evidence that Anniston must price below some measure of cost to implement the program. Aniston's finance department states that the deal will only be profitable if enough customers take the deal, enough sales are generated from new purchasers, and enough regular price military trucks and parts sales are made. These strict requirements to achieve profitability could indicate that the margin is very low and that the company might be taking a loss on each of the transmissions sold under the deal and recouping those losses through any non-deal sales. In addition, Freeleaner and ZX stated that the deal price would be below Anniston's manufacturing costs. They are basing this on reliable information gathered during the customer audit and the due diligence for the failed merger. But it is unclear what measures of cost the finance department, Freeleaner, and ZX are using. Could you tell me if Anniston will have to price below its AVC to implement the deal? I could do a more complete analysis with this information. As it stands, I think there is little concern that the deal would fail the price-cost test. If Anniston would like to lower its risk of exposure, it can lower the discount to 10% or less.

Applicant Details

First Name	**Jordan**
Middle Initial	**E**
Last Name	**Hodge**
Citizenship Status	**U. S. Citizen**
Email Address	**jehodge6@icloud.com**
Address	**Address** Street **5972 Jake Sears Circle, Apt. 204** City **Virginia Beach** State/Territory **Virginia** Zip **23464** Country **United States**
Contact Phone Number	**804-837-9490**

Applicant Education

BA/BS From	**Magdalen College of the Liberal Arts**
Date of BA/BS	**May 2018**
JD/LLB From	**Regent University School of Law** **http://www.regent.edu/acad/schlaw/**
Date of JD/LLB	**May 1, 2022**
Class Rank	**15%**
Law Review/Journal	**Yes**
Journal(s)	**Regent University Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**Yes**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

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References

Noah Berry
(757) 352-4661
noahber@regent.edu

Janis Kirkland
(757) 352-4586
janikir@regent.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

JORDAN E. HODGE
5972 Jake Sears Circle, Apt. 204, Virginia Beach, VA 23464 | (804) 837–9490
jhodge@hodgefirm.law | jordhod@mail.regent.edu

June 18, 2021

The Honorable Elizabeth W. Hanes
United States District Court, Eastern District of Virginia
701 East Broad Street
Richmond, Virginia 23219

Dear Magistrate Judge Hanes:

I am a rising third–year student at Regent University School of Law and I am writing to apply for the 2022–2024 Clerkship position with your chambers.

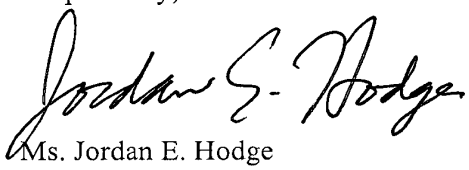
A clerkship in your chambers is a magnificent opportunity, not only to learn and to grow before stepping into the role of advocate, but also to serve you, the Richmond division of the Eastern District of Virginia, and the citizens who come before the court seeking relief. I have lived around Richmond for most of my life, and my goal after graduation is to pass the Virginia bar and return to the area to serve the citizens of the Commonwealth. I hope to practice in the family law arena eventually, but I would like to spend work within the court system first.

I am excelling in my studies, particularly in legal research and writing. While a Staff Editor for Regent University Law Review, I researched Virginia's self-defense precedent as applied to battered women and wrote a Student Note on the subject; this article will be published in the Law Review in November of this year. Additionally, I greatly enjoyed and performed well in my courses in Federal Civil Procedure and the Federal Rules of Evidence. I was able to apply the knowledge I learned from these courses to practice last year when I assisted my father, a solo practioner in my hometown, with research and drafting for a federal case before District Judge Robert E. Payne in the Richmond division of the Eastern District. With appropriate supervision, I drafted a Motion to Compel Responses to Discovery Requests, which Judge Payne ultimately granted, and an accompanying Brief in Support; the Brief is included here as my writing sample.

I thrive in positions driven by deadlines, and my organization skills enable me to meet these deadlines in an efficient and careful manner. In addition to my writing abilities, I am a clear communicator with excellent interpersonal and collaborative skills as well as a determined worker in all tasks. With excitement, I welcome the challenge of the fast-paced world of a law clerk.

Thank you for your time and your consideration. I look forward to hearing from you.

Respectfully,



Ms. Jordan E. Hodge

JORDAN E. HODGE

5972 Jake Sears Circle, Apt. 204, Virginia Beach, VA 23464 | (804) 837–9490
jhodge@hodgefirm.law | jordhod@mail.regent.edu

EDUCATION

Regent Univeristy School of Law, Virginia Beach, VA **May 2022**
Candidate for Juris Doctor, Honors Program GPA: 3.56 | Class Rank: 14/96
Honors: Dean's Scholarship | Wilberforce Award Scholarship
Activites: Staff Editor, Regent University Law Review | President, Newman Club for Catholic Students | Resident Director, Regent Village Student Housing
Publications & Presentations: First Place Winner of Hon. Leroy R. Hassell, Sr. Writing Competition 2021 for Student Note to be published in Regent University Law Review in November 2021 | Guest Presentation, Family Law Class in Spring 2021 | Guest Author, Blog Post for Regent Law Family Restoration Blog, Summer 2021

Magdalen College of the Liberal Arts, Warner, NH **May 2018**
Bachelor of Arts in Classical Liberal Studies, Political Science Major with Honors | Apostolic Catechetical Diploma
Activities: Student Activities Board | President Advisory Counsel
Employment: Humanities Tutor | Kitchen Supervisor | Admissions Assistant

LEGAL EXPERIENCE

Juvenile & Domestic Relations Court, Hampton, VA **Summer 2021**
Judicial Intern for Chief Judge Jay E. Dugger
- Observe court proceedings for child support and custody, foster care, domestic violence, and juvenile criminal charges.
- Research changes in law for abuse and neglect and foster care and recommend updates for District Judge's Benchbook.

Barry C. Hodge, Attorney at Law, Powhatan, VA **June 2014–present**
Paralegal | Office Manager for Successful Solo Practitioner
- Draft and edit legal documents such as Motion to Compel, discovery responses, and Privilege Logs.
- Conduct statutory and case research for state and federal cases, summarize findings, and present to attorney.
- Train administrative assistant.

Regent University School of Law, Virginia Beach, VA **August 2020–May 2021**
Legal Writing Fellow
- Tutored first-year law students in the Legal Analysis, Research, and Writing program.
- Assisted students with case research and best methods for utilizing legal databases.
- Aided students with techniques for improving fundamental and legal writing skills, including Bluebook citation.

Commonwealth's Attorney's Office, Powhatan, VA **Summer 2020**
Legal Intern for Assistant Commonwealth's Attorney for Juvenile & Domestic Relations Court
- Attended court proceedings and witness preparation meetings.
- Observed forensic interviews with minors at Child Advocacy Center and attended multi-discipline Sexual Assault Response Team review for ongoing and closed cases involving minors.

PROFESSIONAL EXPERIENCE

Northeast Catholic College, Warner, NH **July 2018–July 2019**
Administrative Assistant to the Academic Dean
- Reviewed student transcripts and academic progress.
- Coordinated academic programs such as class registration, senior theses, final exams, and guest lectures.
- Directed and oversaw work study students.

Career Pathways Coordinator
- Counselled students individually to discuss and achieve career goals and build resumes.
- Organized, advertised, and coordinated monthly workshops with outside experts.

The Family Foundation of Virginia, Richmond, VA **June–July 2018**
Policy Intern for Legislative Counsel
- Researched history of Virginia's legislature and Code.
- Compiled information for comparative review of Virginia's sex-education curriculum in public schools.

ADDITIONAL ACKNOWLEDGEMENTS

Chief Instructor, Warrior's Way Martial Arts Institute, 2017–present
Instructor, Martial Arts World of Powhatan, Summer 2014–December 2016

Regent University [PROD]
Virginia Beach, VA 23464

Student No:B07025598 Date of Birth: 10-JAN-1996 Date Issued:31-MAY-2021 OFFICIAL

Record of : Jordan E Hodge

Current Name:Jordan E Hodge

3434 Richards Run
Powhatan, VA 23139
United States of America

Issued To : JORDAN EMERICK HODGE

Course Level : First Professional Law

Matriculated: Fall 2019

Current Program
Degree : Juris Doctor
Program : J.D. - Juris Doctor
Major:
Law

Subj	No.	Title	Cred	Grade	Pts	R
INSTITUTION CREDIT:						
Fall 2019						
LAW	511	Christian Foundations of Law	2.00	B+	6.66	
LAW	521	Contracts I	3.00	B+	9.99	
LAW	541	Torts I	2.00	B	6.00	
LAW	551	Civil Procedure	2.00	A	8.00	
LAW	552	Legal Analysis, Research & Writing I	3.00	A	12.00	
LAW	561	Property I	3.00	B+	9.99	

Earned Hrs	GPA-Hrs	QPts	GPA
15.00	15.00	52.64	3.50

Spring 2020						
LAW	512	Foundations of Practice	1.00	P	0.00	
LAW	522	Contracts II	2.00	B+	6.66	
LAW	542	Torts II	3.00	A-	11.01	
LAW	553	Legal Analysis, Research & Writing II	3.00	A	12.00	
LAW	554	Civil Procedure II	3.00	A	12.00	
LAW	562	Property II	3.00	B	9.00	

Earned Hrs	GPA-Hrs	QPts	GPA
15.00	14.00	50.67	3.61

Summer 2020						
LAW	795	Externship: Judicial/Govt	1.00	P	0.00	

Earned Hrs	GPA-Hrs	QPts	GPA
1.00	0.00	0.00	0.00

Fall 2020						
LAW	652	Evidence	4.00	A	16.00	
LAW	672	HumanRights,CivLib&NatlSec	1.00	B	3.00	
LAW	683	Constitutional Law I - Constitutional Structure	3.00	A	12.00	
LAW	691	Professional Responsibility	3.00	B+	9.99	
LAW	748	Academic Legal Scholarship	2.00	A	8.00	

Earned Hrs	GPA-Hrs	QPts	GPA
13.00	13.00	48.99	3.76

Spring 2021						
LAW	531	Criminal Law	3.00	B+	9.99	
LAW	661	Family Law	3.00	B	9.00	

Subj	No.	Title	Cred	Grade	Pts	R
INSTITUTION CREDIT:						
LAW	684	Constitutional Law II - Individual Rights	3.00	B+	9.99	
LAW	732	Juvenile Law	3.00	A-	11.01	
LAW	780P1	Professional SkillsPracticum I	2.00	P	0.00	

Earned Hrs	GPA-Hrs	QPts	GPA
14.00	12.00	39.99	3.33

Fall 2021					
LAW	602	Business Associations	3.00	In Prog	Course
LAW	621	UCC I	2.00	In Prog	Course
LAW	655	Negotiations	3.00	In Prog	Course
LAW	662	Wills, Trusts & Estates	3.00	In Prog	Course
LAW	774	First Amendment Law	3.00	In Prog	Course

Transcript Totals	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION	58.00	54.00	192.29	3.56
TOTAL TRANSFER	0.00	0.00	0.00	0.00
OVERALL	58.00	54.00	192.29	3.56

----------END OF TRANSCRIPT----------

Magdalen College of the Liberal Arts

511 Kearsarge Mountain Road · Warner, NH 03278
603.456.2656 · www.magdalen.edu

Student: Hodge, Jordan
Address: 3434 Richards Run
City, State, Zip: Powhatan, VA 23139

Date Entered: Fall 2014
Degree Awarded: B A Political Science
Date Degree Awarded: 5/5/2018

Courses		Credits Sought	Credits Earned	GPA Credits	Quality Points	GPA
Fall 2014						
Phil & Hum 101: Ancient Greece I	A-	5	5	5	18.35	
Theology 101: Sacred Scriptures	A-	3	3	3	11.01	
Writing Workshop 101	A-	3	3	3	11.01	
Latin 101: Fundamentals I	A	3	3	3	12.00	
Music 101: Music and Singing I	A	1	1	1	4.00	
Choir	A	1	1	1	4.00	
Current Semester		16	16	16	60.37	3.77
Cumulative		16	16	16	60.37	3.77
Fall 2015						
Phil & Hum 201: Greece, Rome, Birth Christ	A	4	4	4	16.00	
Theology 201: The Creed	A-	3	3	3	11.01	
Geometry 201	A	3	3	3	12.00	
Latin 201: Intermediate I	A	3	3	3	12.00	
Music 201: Medieval- Baroque	A	1	1	1	4.00	
Choir	A	1	1	1	4.00	
Honors Colloquium	A	1	1	1	4.00	
Current Semester		16	16	16	63.01	3.94
Cumulative		49	49	49	189.40	3.87
Fall 2016						
Phil & Hum 301: Renaissance	A	5	5	5	20.00	
Theology 301: Christology	A	3	3	3	12.00	
Physics 301	A	3	3	3	12.00	
Honors Colloquium	B	1	1	1	3.00	
Choir	A	1	1	1	4.00	
Political Conc: Modern Ideologies	A	3	3	3	12.00	
Current Semester		16	16	16	63.00	3.94
Cumulative		81	81	81	316.07	3.90
Fall 2017						
Phil & Hum 401: Late Modern	A	5	5	5	20.00	
Biology 401	A	3	3	3	12.00	
Comp Cultures 401	A	2	2	2	8.00	
Choir	A	1	1	1	4.00	
Political Major: International Relations	A	3	3	3	12.00	
Honors Colloquium	A	1	1	1	4.00	
Current Semester		15	15	15	60.00	4.00
Cumulative		113	113	113	443.08	3.92
Cummulative					GPA 3.93	

Courses		Credits Sought	Credits Earned	GPA Credits	Quality Points	GPA
Spring 2015						
Phil & Hum 102: Ancient Greece II	A-	5	5	5	18.35	
Theology 102: Sacramentology	A	3	3	3	12.00	
Writing Workshop 102	A	3	3	3	12.00	
Latin 102: Fundamentals II	A	3	3	3	12.00	
Music 102: Music & Singing II	A	1	1	1	4.00	
Choir	A	1	1	1	4.00	
Honors Colloquium	A-	1	1	1	3.67	
		17	17	17	66.02	3.88
		33	33	33	126 39	3.83
Spring 2016						
Phil & Hum 202: Medieval Christendom	A	4	4	4	16.00	
Theology 202: Chistian Morality	A	3	3	3	12.00	
Astronomy 202	A	3	3	3	12.00	
Latin 202: Intermediate II	A	3	3	3	12.00	
Art 202:	A-	1	1	1	3.67	
Choir	A	1	1	1	4.00	
Honors Colloquium	A	1	1	1	4.00	
Current Semester		16	16	16	63.67	3.98
Cumulative		65	65	65	253.07	3.89
Spring 2017						
Phil & Hum 302: Enlghtmt & 19th C	A	5	5	5	20.00	
Theology 302: Ecclesiology & Liturgy	A	3	3	3	12.00	
Physics 302	A-	3	3	3	11.01	
Latin 306: Caesar	A	1	1	1	4.00	
Choir	A	1	1	1	4.00	
Junior Project	A	1	1	1	4.00	
Political Conc: Modern Ideologies	A	3	3	3	12.00	
Current Semester		17	17	17	67.01	3.94
Cumulative		98	98	98	383.08	3.91
Spring 2018						
Phil & Hum 402: Postmodern	A	5	5	5	20.00	
Biology 402	A	3	3	3	12.00	
Comp Cultures 402	A	2	2	2	8.00	
Senior Thesis	A	3	3	3	12.00	
Choir	A	1	1	1	4.00	
Political Major: Gov of Western Europe	A	3	3	3	12.00	
Senior Comprehensives	P	1	1	0	0.00	
Current Semester		18	18	17	68.00	4.00
Cumulative		131	131	130	511.08	3.93

Registrar

6/8/2021
Date

An official transcript must have both the Registrar's signature and the raised College Seal

JORDAN E. HODGE

5972 Jake Sears Circle, Apt. 204, Virginia Beach, VA 23464 | (804) 837–9490
jhodge@hodgefirm.law | jordhod@mail.regent.edu

PROFESSIONAL REFERENCES

PROFESSOR JANIS KIRKLAND
Professor at Regent University School of Law
1000 Regent University Drive, RH 352A
Virginia Beach, VA 23464
(757) 352-4586
janikir@regent.edu
Professor Kirkland was my supervisor in my position as Legal Writing Fellow and my professor for Legal Analysis, Research, and Writing I and II.

MR. NOAH BERRY
Director of Residence Life at Regent University
5960 Jake Sears Circle, Apt. 104
Virginia Beach, VA 23464
(757) 352-4895
noahber@regent.edu
Mr. Berry is my current supervisor in my position as Resident Assistant and will continue as my supervisor when I assume the position of Resident Director next year.

DR. BRIAN FITZGERALD
Academic Dean and Professor at Magdalen College of the Liberal Arts
511 Kearsarge Mountain Road
Warner, NH 03278
(603) 456-2656
bfitzgerald@magdalen.edu
Dr. FitzGerald was my supervisor in my position as Administrative Assistant to the Academic Dean at Magdalen College of the Liberal Arts for the 2019–2020 academic year and my professor during my time as a student.

Janis L. Kirkland
Director, Legal Analysis, Research, and Writing Program
Regent University School of Law
1000 Regent University Dr.
RH-352-I
Virginia Beach, VA 23464
janikir@regent.edu
757-352-4334

June 22, 2021

Jordan E. Hodge
Clerkship Recommendation

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am writing to support Jordan E. Hodge's application for a clerkship position following her graduation from Regent University School of Law in May 2022. Jordan was a top student in my Legal Analysis, Research, and Writing course during her first year here at Regent Law and worked with me last year as a Legal Writing Fellow.

The Regent Legal Analysis, Research, and Writing course forces students to read complete cases (unlike the redacted cases used in doctrinal courses), to discern which material is applicable for an assigned problem, and to develop appropriately focused legal analysis. Thus, students must show the type of critical thinking and analysis used in legal practice. Jordan's work products in my class were excellent. She received a solid "A" both semesters, and one semester, Jordan's score was only a single point below that of the student who received my book award. In addition to producing consistently good work products, I found Jordan to be personable and to display a superb work ethic, making her someone I'd like to work with. She always began projects promptly and demonstrated good time management. She had good research and analytical skills. Both during class and in our conferences, Jordan's questions were consistently insightful.

During her 2L year, Jordan worked as one of my two Legal Writing Fellows. In this role, she offered support to first-year students as they struggled to learn the analytical fundamentals and to produce well-researched, analyzed, and written work products. I sought Jordan out for this position because during her time in my first-year course, I realized that other students looked up to Jordan as a natural leader, making me confident that my current students would find her approachable and receive consistently reliable support and assistance. In her Fellow position, Jordan did an excellent job of staying abreast about our class topics and how to apply the basic principles in each student work product. She seemed to be particularly adept at assessing students' understanding and offering helpful support, which allowed students to continue their growth process successfully. I received consistently favorable reviews of Jordan's work, as many students expressed appreciation for her support.

Jordan also helped me develop the moot court problem for the Spring 2021 curriculum. Following my initial research to explore the basic principles, Jordan did an excellent job of updating and fleshing out my work. She also offered insightful tips about improving the fact pattern to provide a balanced problem that would offer both sides the opportunity to make successful moot court arguments. I have found Jordan to be a pleasure to work with and unfailingly reliable. Every time I've asked Jordan to undertake a new project, I can count on excellence: insightful work that is well developed and timely. Although I'm sorry Jordan chose not to continue as a Fellow next year, I respect her desire to prioritize her time elsewhere.

Jordan displays good leadership qualities in other areas, beyond the Fellow work she did for me. During her 2L year, Jordan served as a Resident Assistant in Regent's student housing, and she was promoted to Resident Director for her 3L year. As Resident Director, Jordan will supervise *all* undergrad and graduate Resident Assistants and will have additional administrative duties in the Regent Housing Office. Within the Law School, Jordan's leadership talents are displayed by her position as President of the Law School's Newman Club and as an editor of the Regent University Law Review.

In addition to the skills development Jordan obtained from her work on Law Review, she also has pursued other opportunities to increase her skills. During Summer 2020, Jordan interned in the Commonwealth Attorney's Office in Powhatan, Virginia. This summer, Jordan is interning with Chief Judge Jay Dugger of the Hampton Juvenile and Domestic Relations Court. She also has done a significant amount of research and writing under the supervision of her father, a successful solo attorney.

Before joining the Regent Law faculty, I practiced law for ten years at Hunton and Williams (now Hunton Andrews Kurth LLP). Jordan is exactly the type of person I most appreciated as a young associate. She is bright and has strong analytical and writing skills. With her excellent interpersonal skills and work ethic, I would be confident that Jordan would consistently provide timely

and high-quality work products. Finally, she displays unimpeachable values and a commitment to professionalism.

I strongly encourage you to consider Jordan Hodge for a clerkship position. She will be a valued member of your team. Please feel free to contact me if you'd like additional information. I can be reached at 757-352-4334 or at the following email: janikir@regent.edu.

Sincerely,

Janis L. Kirkland

Noah Berry
5960 Jake Sears Cir. Virginia Beach, VA 23464 · 757-352-4661 · noahber@regent.edu

To Whom It May Concern:

It is my pleasure to strongly recommend Jordan Hodge for a clerkship position for the Supreme Court of Virginia.

I am Noah Berry, the Director of Residence Life at Regent University. I have four years of experience working in higher education and have seen many young professionals come and go. Jordan Hodge is one individual I have worked with who uniquely stands out.

During our time together, Ms. Hodge displayed great talents in building both professional and personal relationships with residents. When we first met, I was immediately impressed with Jordan, but during the time we worked together, her understanding of confidentiality and her ability to pick up on administrative tasks grew far more than that of her peers.

While serving as a Resident Assistant (RA), Jordan took it upon herself to help restructure our office's day-to-day operations. She made the housing office run more efficiently and made it easier for RAs to fulfill their job responsibilities. Additionally, she helped redesign our Resident Assistant training course for both new and returning RAs.

It's not just her administrative skills that impress me; however, Jordan was a joy to work with because of her amazingly positive attitude and work ethic. Her attention to detail and confidence were also necessary and valued not just by myself but also by her peers, who often relied on her to get the job done.

If you need more information or specific examples, please do not hesitate to contact me at 757-352-4661. As a recommendation letter likely only provides a snapshot of her talents and achievements, I would be happy to further elaborate on my time working with her.

Sincerely,
Noah Berry, Director of Residence Life
Regent University

Hodge, Jordan – Writing Sample

UNITED STATES DISTRICT COURT
for the
EASTERN DISTRICT OF VIRGINIA
Richmond Division

WEIGHTPACK, INC.,

v.

Civil Action No. 3:19-cv-00865-REP
JURY TRIAL DEMANDED

ADONIS, LLC;
and
PFILIX, INC,

DEFENDANTS.

PLAINTIFF'S BRIEF IN SUPPORT OF ITS MOTION TO COMPEL DEFENDANTS TO RESPOND TO PLAINTIFF'S DISCOVERY REQUESTS

Plaintiff, WeightPack, Inc. ("WPI"), submits this Brief in Support of its Motion to Compel Defendants, Adonis, LLC and Pfilix, Inc., to Respond to WPI's Discovery Requests (herein "Motion") pursuant to Local Rule 7(F).

RELEVANT FACTS

On March 4, 2020, this Court entered an Order Setting Pretrial Conference, ordering the parties to serve discovery within certain dates and detailing when certain discovery deadlines begin to run. ECF No. 23. Although the Order had some inconsistency about such deadlines, the parties agreed that responses to such discovery were due on or before April 17, 2020, leaving objections, per the Local Rules, due on or before April 2, 2020.

On March 16, 2020, Plaintiff served Defendants with its First Set of Interrogatories and First Set of Requests for Production of Documents.

On April 24, 2020, undersigned Counsel for Plaintiff wrote a letter to Counsels for Defendants informing them that he had not received any objections nor any responses to

Plaintiff's first discovery requests (Interrogatories and Requests for Production) that were previously served and were overdue, with responses overdue by a week and objections overdue by over three weeks. Undersigned Counsel proposed a phone consultation the following week in an attempt to resolve the issues. Attached as Exhibit 1.

On April 28, 2020, Counsels discussed the matters, among other things, and undersigned Counsel for Plaintiff understood that responses would be forthcoming by week's end or early the following week. On the same day, Defendants served responses to Plaintiff's First Set of Interrogatories and written responses to Plaintiff's First Set of Requests for Production of Documents. Attached as Exhibits 2 and 3.

On May 4, 2020, Defendants served the documents in response to Plaintiff's First Set of Requests for Production of Documents, totaling approximately 579 pages. Attached as Exhibit 4.

On May 21, 2020, after review and analysis of the Defendants' produced documents and responses to interrogatories and requests to produce, undersigned Counsel wrote a detailed letter to Counsels for Defendants setting forth numerous discovery deficiencies and requesting supplementation on or before June 5, 2020. In sum, this letter noted the lateness of objections, lateness of responses, unfounded waived objections to almost every request, deficient interrogatory responses and production, and requested to confer by phone the week before such deadline (June 5, 2020) to satisfy Local Rule 37(E). Attached as Exhibit 5.

On June 30, 2020, undersigned Counsel and Counsels for Defendants attended a telephone conference with Judge Payne in an additional attempt to resolve this dispute. After this telephone conference, an Order was entered and filed outlining deadlines for the resolution of this discovery dispute (ECF No. 36).

On July 1, 2020, in accordance with this Court's June 30, 2020 Order (ECF No. 36), undersigned Counsel and Counsels for Defendants met and conferred by telephone. Undersigned Counsel put forth the position that since most of the interrogatory responses referred to produced documents for support that had not been produced, adequate supplemental documentation should satisfy the Plaintiff's objections to interrogatory deficiencies. It was agreed that additional supplemental documents would be produced, but the parties disagreed as to a timeline, with undersigned Counsel desiring supplemental production by at least midnight July 5 so that undersigned Counsel could have at least two days to review and file this Motion and Brief, if necessary, and Counsels for Defendant disagreed.

On July 6, 2020, Counsels for Defendants contacted undersigned Counsel via email to request a follow-up meet and confer by telephone that afternoon. During this telephone conference, Counsels for Defendants stated that Defendants did not support any specific objections to Plaintiff's Interrogatories or Requests to Produce Documents with authority, and that Defendants' supplemental document responses would be forthcoming later that day. Counsel for Defendants also stated that Defendants were dropping their claim for lost business/profits.

On July 6, 2020, at 3:43p.m., undersigned Counsel received via email 189 pages of additional documents in response to Plaintiff's discovery requests. Attached as Exhibit 6.

LAW & ARGUMENT

Law-of-the-Case

The following rulings of the Court represent the law-of-the-case. This doctrine recognizes that "when a court decides upon a rule of law, that decision should continue to